No. 77-1575

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

MIDWEST VIDEO CORPORATION, ET AL., RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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MIDWEST VIDEO CORPORATION, ET AL., RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Federal Communications Commission respectfully asks this Court to issue a writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A)* is not yet reported. The orders of the Federal Communications Commission (Apps. B and C) are reported at 59 FCC 2d 294 and 62 FCC 2d 399.

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* The appendices to this petition are set forth under separate cover.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1978. A stay of mandate was granted by the court by order dated April 4, 1978 (App. D), and this petition for certiorari is being filed within the time allowed by the order staying the mandate. This Court has jurisdiction by virtue of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether the imposition by the Federal Communications Commission of access, channel capacity and equipment requirements on cable television systems which have 3500 or more subscribers, and which carry broadcast signals, is within the Commission's regulatory authority over cable television as previously interpreted by this Court.

Whether the Commission's effort to apply an access requirement to the cable television industry as an important component of the agency's regulatory scheme is permissible under the First and Fifth Amendments.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fifth Amendments are set forth at the end of this petition. Sections 1, 2(a), 3(h), 303(g), 303(r) and 307(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151, 152(a), 153(h), 303(g), 303(r) and 307(b), are set forth in App. E.

STATEMENT

This petition seeks review of an opinion and judgment whereby the Eighth Circuit Court of Appeals set aside an order in which the Federal Communications Commission amended its access, channel capacity and equipment rules for cable television systems.

A. Background

The Commission's jurisdiction over cable television, at least insofar as its regulation of cable is "reasonably ancillary" to its regulation of the broadcast industry, was upheld by this Court in 1968. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) (hereafter "*Southwestern*"). The following year, the Commission required all cable systems which had 3500 or more subscribers, and which carried broadcast signals, to engage in "cablecasting" and to have equipment available for the production and presentation of local programming. Former rule § 74.1111(a), later § 76.201; *see First Report and Order in Docket 18397*, 20 FCC 2d 201 (1969). This "origination" rule was ultimately affirmed in *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972) (hereafter "*Midwest Video I*"). By that time, however, the Commission had also adopted an "access" rule. Specifically, in 1972, the Commission required all cable operators in the top 100 markets to build their systems with at least 20-channel capacity and to designate four of those channels for public, governmental, educational and leased access respectively. All cable systems commencing operation after March

31, 1972 were to comply immediately, while those which had begun operating prior to that date were generally grandfathered until March 31, 1977. Former rule § 76.251 (App. F); *see Cable Television Report and Order* (Dockets 18397 *et al.*), 36 FCC 2d 143, 189-98 (1972). That rule was also affirmed. *American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975).

In 1974, the Commission repealed its origination rule on the ground that access was a less burdensome but equally effective means of promoting localism and diversity. *Report and Order in Docket 19988*, 49 FCC 2d 1090, 1099-1100 (1974). However, the Commission retained its equipment availability requirement so that facilities would be available for the production of access programming. Former rule § 76.253; *see id.* at 1107-08, 1110-1111.

B. The Commission's Order

As the Commission gained further experience with its access rules, it recognized that it would have to weigh its commitment to access against the economic realities involved in rebuilding older cable systems to meet agency requirements. The Commission therefore instituted two more rulemaking proceedings. The first, Docket 20363, resulted in an order cancelling the March, 1977 compliance deadline. *Report and Order in Docket 20363*, 54 FCC 2d 207 (1975). The second, Docket 20508, led to an order in which the Commission reaffirmed its access policy but relaxed its rules substantially. *Report and Order in*

Docket 20508, 59 FCC 2d 294 (1976) (App. B). It is the latter order which is the subject of this litigation.[1]

Essentially, the Commission amended its rules in three major respects. First, it changed its criterion for determining where access and channel capacity requirements would be imposed. Instead of the "top 100 markets" standard, the Commission elected to use the same 3500-subscriber "trigger" for access that it had previously employed for origination (App. B, 105-08, 111-20). Second, the Commission decided that multiple channels need be devoted to access only to the extent that demand existed for their full time use, and then only if a system had sufficient activated channel capacity (App. B, 139-41 & n. 18). Third, in order to minimize the need for cable operators to rebuild existing systems prior to their becoming "naturally" obsolete, the Commission determined that such systems would not have to comply with the 20-channel requirement until June, 1986 (App. B, 148-161).[2] On reconsideration, the Commission affirmed its order with minor clarifications (App. C).

C. The Decision Below

Midwest Video Corporation, which had become subject to access requirements for the first time due to

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[1] The Commission's order in Docket 20363 has been challenged in *National Black Media Coalition* v. *FCC*, No. 75-1792 (D.C. Cir.), a case held in abeyance pending the outcome of this proceeding.

[2] The text of the rules as amended appears at App. B, 168-77. The changes discussed above were embodied in §§ 76.252, 76.254 and 76.256.

the adoption of the 3500-subscriber "trigger," sought appellate review of the Commission's order pursuant to 47 U.S.C. § 402(a). In an opinion filed February 21, 1978 (App. A), the United States Court of Appeals for the Eighth Circuit set aside the access, channel capacity and equipment availability rules as beyond the Commission's jurisdiction. The court said that the Commission lacked authority to adopt these rules because neither Title II of the Communications Act (common carrier regulation) nor Title III (broadcast licensing) encompassed cable television or expressed any Congressional intent regarding it. In addition, the court stated that the access rules did not satisfy the "reasonably ancillary" test of *Southwestern* and *Midwest Video I*, since they had nothing to do with the welfare of television broadcasting and had no corollary in broadcast regulation. Finally, the court below held that, since access was common carrier regulation which, in the court's view, could not be applied to broadcasters, it was also an impermissible imposition on cable operators (App. A, 20-64).

A majority of the court of appeals also addressed the constitutionality and reasonableness of the rules. While it declined to rest its result upon its observations about these issues, the majority said that the rules violated the First Amendment editorial rights of cable entrepreneurs, constituted a "taking" without due process and lacked an articulated rationale (App. A, 64-91).

REASONS FOR GRANTING THE WRIT

A. The Jurisdictional Question

In deciding the jurisdictional question in this case, the court of appeals overlooked Section 2(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 152(a), as the source of the Commission's claimed regulatory power over cable television. Instead, it read the Commission as having sought to derive its regulatory power from the objectives it was pursuing. The court below then concluded that "objectives do not confer jurisdiction" (App. A, 20 and 36-45). This resolution of the jurisdictional question conflicts with this Court's decisions in *Southwestern* and *Midwest Video I*, *supra*.

In *Southwestern*, this Court held that cable television systems engage in "interstate communication by wire or radio" within the meaning of Section 2(a) of the Act, and consequently, that the Commission has regulatory jurisdiction over cable television, at least insofar as its regulation is "reasonably ancillary" to its regulation of the broadcast industry. 392 U.S. at 172-73 and 178. Thereafter, the Commission adopted a program origination rule requiring cable systems which carried broadcast signals and had 3500 or more subscribers "[to operate] to a significant extent as a local outlet by cablecasting" and "[to have] available facilities for local production and presentation of programs other than automated services." Former rule § 74.1111(a), *supra*. Midwest Video challenged the Commission's action, and the

court below set aside the program origination rule as outside the Commission's authority. *Midwest Video Corp.* v. *United States*, 441 F.2d 1322 (1971). By a split decision, this Court reversed. *Midwest Video I*, *supra*.

Mr. Justice Brennan's opinion, which expressed the views of four members of the Court, held that cablecasts, including those only local in nature, are within the Commission's jurisdiction under Section 2(a) of the Act when transmitted over cable television systems which also carry broadcast signals. 406 U.S. at 662-63 & n.21. Only after finding that Section 2(a)'s requirement for Commission jurisdiction had been satisfied did the plurality of this Court proceed to consider the Commission's objectives in adopting a program origination rule. This further step was necessary because "§ 2(a) does not in and of itself prescribe any objectives for which the Commission's regulatory power over [cable television] might properly be exercised." *Id.* at 661. The Commission's objectives in *Midwest Video I*, namely "increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services,"[3] were approved as proper goals for the Commission to pursue in regulating, not only broadcasting, but cable television as well. *Id.* at 667-68.[4]

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[3] *Id.* at 668, quoting from *First Report and Order*, *supra*, 20 FCC 2d at 202.

[4] The plurality noted that the Commission derived these objectives from Sections 1, 303(g) and 307(b) of the Communications Act, 47 U.S.C. §§ 151, 303(g) and 307(b). *Id.* at 669-70.

In sum, the plurality in *Midwest Video I* agreed with the Commission that the agency's concern with cable systems' carriage of broadcast signals was not simply a matter of avoiding adverse effects on local television, *id.* at 664, but properly extended, under the "reasonably ancillary" test, to regulations which call upon those cable systems that carry broadcast signals "to promote the objectives for which the Commission ha[s] been assigned jurisdiction over broadcasting." *Id.* at 667.[5]

Under the analysis in *Midwest Video I*, the court below was not justified in holding that the access and related rules were beyond the Commission's authority. For those rules, both in their original form as adopted in 1972 and as modified in 1976 in the order at issue below, were adopted for the express purpose of "increasing the number of outlets for local self-expression and augmenting the diversity of programs and types of services available to the public."[6] And

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[5] The Chief Justice concurred in the result in *Midwest Video I*. His separate opinion stated, *inter alia*, that "until Congress acts, the Commission should be allowed wide latitude" to regulate cable television systems which "interrupt" broadcast signals and "put [them] to their own use for profit." *Id.* at 676 (concurring opinion).

[6] App. B, 103; *see also Cable Television Report and Order*, *supra*, 36 FCC 2d at 190. Although the program origination rule spoke in terms of programming to be originated by the cable system itself, the accompanying *First Report and Order*, *supra*, declared that one of the Commission's purposes in adopting the origination requirement was "to insure that

the court below agreed that "[t]here is no question that public access necessarily increases outlets and augments choices" (App. A, 39 & n.45).[7]

Even assuming, for purposes of argument, that the Eighth Circuit's analysis of the jurisdictional question might ultimately be reconciled with *Midwest Video I*, the court below, at the very least, has gone beyond *Midwest Video I* and decided an important question which has not been, but should be, addressed by this Court. Specifically, the court below would limit the Commission's regulatory authority over cable television to only those means of regulation which are employed in the broadcasting area. This is apparent from the court's extended discussion of what the Court perceives as the Commission's statutory inability[8] to impose an access requirement on

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cablecasting equipment will be available for use by others originating on common carrier channels." 20 FCC 2d at 214. This Court in *Midwest Video I* was well aware of the linkage, under the Commission's developing cable policies, between origination and access requirements. *See* 406 U.S. at 653 nn.5-6, 654 & n.8.

[7] It was precisely because an access policy was regarded as a "more appropriate means to foster local programming than imposing mandatory programming requirements on [cable] system operators . . ." that the Commission decided to repeal its origination rule (App. B, p. 119 & n.7).

[8] The court bases its conclusion that the Commission cannot require mandatory access of broadcasters on this Court's decision in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) (hereafter *CBS* v. *DNC*), and on Section 3(h) of the Communications Act, 47 U.S.C. § 153(h) (App. A, 52-53 n.58 and 59-64). However, this Court in *CBS* v. *DNC*, although well aware of the existence of Section 3(h), which declares that broadcasters are not to be deemed common carriers, did not say that Section 3(h) would prohibit the Commission from imposing a limited right of access upon broadcasters. Instead, this Court said that Congress had chosen to leave questions of access "with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require." 412 U.S. at 122; *see also id.* at 105-109. Moreover, the Court concluded its opinion by adverting to the possibility that the Commission might devise "at some future date" a "limited right of access that is both practicable and desirable." *Id.* at 131.

broadcasters (App. A, 34-35 & n. 39, 51-53, 59-64), and also from the court's repeated emphasis on the fact that the origination rule upheld in *Midwest Video I* only required cable systems "to act like broadcasters" (App. A, 30), and "[to] do what broadcasters do" (App. A, 28).

It is of course correct that the Commission, with this Court's approval, has thus far decided, in the broadcasting context, that "on balance the undesirable effects of [a] right of access . . . outweigh the asserted benefits." *CBS* v. *DNC*, *supra*, 412 U.S. at 122. But nothing in this Court's decision in *Midwest Video I* denies the Commission's discretion to conclude that, although the statutory objectives are the same for both broadcasting and cable television, appropriate methods for pursuing those objectives may differ between the two services.[9] The opinion below,

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[9] In contrast to broadcasting, where technological scarcity exists, both this Court and the Commission have recognized that cable television offers the technological potential of a "multichannel capacity" which can be utilized to provide a variety of new programming and other communications serv-

if not constituting an outright conflict with *Midwest Video I*, at a minimum goes beyond that case when the court holds that "[the broadcasting] context . . . limits the *means* by which [valid] goals may be sought" (App. A, 34-35 (emphasis added)).

The holding of the court below that the access rules do not satisfy the "reasonably ancillary" test, which measures the Commission's jurisdiction over cable television, also conflicts directly with the holding of the Ninth Circuit in *American Civil Liberties Union* v. *FCC*, *supra*, 523 F.2d 1344 (1975). There, although the matter was raised in the context of complaints that the 1972 access rule did too little, in contrast to Midwest Video's arguments below, the Ninth Circuit held:

> The Commission's failure to impose common carrier obligations on access channels *and its imposition of the [1972 access rule] . . . are actions 'reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting.'* 523 F.2d at 1351 (emphasis added).[10]

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ices, without use of the scarce broadcast spectrum. *Midwest Video I, supra*, 406 U.S. at 651, quoting from *Notice of Proposed Rulemaking and Notice of Inquiry* (Docket 18397), 15 FCC 2d 417, 419-421 (1968).

[10] In *Brookhaven Cable TV, Inc.* v. *Kelly*, —— F.2d —— (1978), the Second Circuit has upheld the Commission's authority to preempt state and local regulation of the prices charged by pay cable systems offering specialized programming for which a per-program or a per-channel charge is made. The court read this Court's decision in *Midwest Video I* as approving the FCC's regulation of cable television "if its regulation will further a goal which it is entitled to pursue in the broadcast area." Slip Opinion in Case Nos. 77-6156 and 6157, decided March 29, 1978, at 2164. In finding that the preemption of pay cable rate regulation met this test, the court declared that "a policy of permitting development free of price restraints at every level is reasonably ancillary to the objective of increasing program diversity . . . ." *Id.*

B. Constitutional Issues

A majority of the court below[11] said that First Amendment and other constitutional considerations reinforced its conclusion on the jurisdictional issue (App. A, 65). Although it refrained from deciding this case on constitutional grounds, the majority clearly indicated that, if it had been necessary to reach the matter, it would have found the access rules "constitutionally impermissible" (App. A, 74).

The majority said that "no nexus exists between [cable's] function of retransmitting broadcast signals and the distinct function of cablecasting" (App. A, 68-69, citing *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974)). According to the majority, cablecasting is "private electronic 'publication'" (App. A, 74), and the Commission's effort to compel access to cable television should fare no better than the earlier unsuccessful governmental attempt to compel access to a newspaper (App. A, 72-74, citing *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974)).

The rejection below of a nexus between broadcast signal retransmission and cablecasting is directly

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[11] Judge Webster did not join Parts II and III of the opinion below (App. A, 91-92).

contrary to the plurality opinion in *Midwest Video I*, *supra*, which held that there were "interdependencies" between broadcast retransmissions over cable systems and cablecasts over those same systems. 406 U.S. at 662-63 & n.21. Similarly, the concurring opinion of the Chief Justice in *Midwest Video I* observed that cable television systems were "dependent totally on broadcast signals." *Id.* at 675.

With respect to the reliance below upon *Miami Herald* v. *Tornillo*, the holding in that case followed "our accepted jurisprudence" concerning the relationship between "government and the *print* media." 418 U.S. at 259 (concurring opinion of Mr. Justice White) (emphasis added). This Court has not yet addressed the question of the status of cable television systems under the First Amendment,[12] although several circuits have upheld, against a First Amendment challenge, limitations imposed by the Commission on the right of cable systems to carry certain broadcast signals.[13] However, this Court has distinguished under the First Amendment between the electronic broadcast media and the print media.

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[12] This Court has noted the existence of the 1972 cable access rule, without any indication that it might be constitutionally suspect. *CBS* v. *DNC*, *supra*, 412 U.S. at 131.

[13] *E.g.*, *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65, 69 (8th Cir. 1968); *Conley Electronics Corp.* v. *FCC*, 394 F.2d 620, 624 (10th Cir.), *cert. denied*, 393 U.S. 858 (1968); *Titusville Cable TV, Inc.* v. *United States*, 404 F.2d 1187, 1189-90 (3d Cir. 1968); *Great Falls Community TV Cable Co.* v. *FCC*, 416 F.2d 238, 240-42 (9th Cir. 1969).

Compare Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) (political-editorial and personal attack rules, providing for a right of reply on broadcasting stations, upheld) with *Miami Herald Publishing Co.* v. *Tornillo*, *supra*."[14] The present case thus presents an opportunity, assuming the Commission is successful in its jurisdictional argument, for this Court to decide whether a First Amendment prohibition on a governmental effort to impose access upon a private medium not subject to extensive regulation, *i.e.*, newspapers, also extends to the Commission's attempt to apply an access requirement to cable television, a medium subject to a "necessarily pervasive" regulatory scheme. *Midwest Video I*, 406 U.S. at 662-63 & n.21, quoting from *General Telephone Co. of Cal.* v. *FCC*, 413 F.2d 390, 401 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).[15] This ques-

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[14] This Court has also recognized that the electronic broadcast media present "special" problems in several other cases including *Va. Pharmacy Bd.* v. *Va. Consumer Council*, 425 U.S. 748, 773 (1976); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 384 (1977); and *First National Bank of Boston* v. *Bellotti*, 46 U.S.L.W. 4371, 4378 n.30 (1978). In addition, Congress has equated cable television systems with broadcasting stations in at least two instances which impinge heavily on First Amendment rights. Both cable systems and broadcasters are subject to the equal time requirement in the Communications Act. *See* 47 U.S.C. § 315(f)(1)(A). Similarly, the statutory prohibition on cigarette advertising is applicable not only to broadcasters, but to "any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." 15 U.S.C. § 1335.

[15] The Commission does not seek review of that aspect of the opinion below which sets aside the provision in the rules,

tion is an important one, which this Court should settle, for, under the First Amendment rationale of the court below, the Commission, (or, for that matter, the Congress) [16] is constitutionally barred from requiring, in a reasonable manner, that cable television's technological capacity be developed to overcome limitations on program diversity, which are inherent in the broadcast spectrum.[17]

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which has been stayed since August 26, 1977, whereby cable operators were required "to exercise prior restraint of obscenity [or indecency]" over access channels (App. A, 72 & n.73, 75-77). As the court below recognized, the Commission, on its own initiative prior to the decision below, had instituted a review of the "prior restraint" provisions of the access rules (App. A, 16-17 & n.19, 72 & n.73).

[16] Moreover, if, as the majority below suggests (App. A, 72-74), cable television systems are truly "private electronic" media, entitled to the same rights afforded newspapers under *Tornillo, supra,* it would seem that any imposition by state or local governmental authorities of an access requirement, as a condition of granting a franchise to operate a cable system, would also run afoul of the First Amendment.

[17] The majority below also indicated that the access rules raised serious constitutional questions under the due process clause (App. A, 77-82). Specifically, the majority appears to have resurrected the holding of the same court in the earlier case involving the program origination rule. There the court had held that the Commission could not require cable operators "as a condition to [their] right to use . . . captured [broadcast] signals in their existing franchise operation to engage in the entirely new and different business of originating programs." *Midwest Video Corporation* v. *United States, supra,* 441 F.2d at 1327. In subsequently reversing the court of appeals, the plurality opinion in this Court said that its resolution of the "reasonably ancillary" issue in favor of the Commission's jurisdiction was dispositive of Midwest Video's

C. Importance of the Case

Since Commission regulation of the industry began in 1965, cable television has grown phenomenally. Currently, there are over 4000 cable systems serving 12.9 million subscribers, or the equivalent of 17.6% of the nation's television homes.[18] Moreover, as this Court recognized in *Midwest Video I*, "[t]he potential of the new industry to augment communication services now available is equally phenomenal," because of the "multichannel capacity" which enables

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additional claim that it was wrongly being asked to go into a new and different business. 406 U.S. at 658 & n.15, 663-64 & n.22. Moreover, the court below, just as the same court had done in the earlier origination case, *see* 441 F.2d at 1325, 1327-28, *see also id.* at 1329 (concurring opinion), characterized the Commission's access regulations as burdensome, requiring vast expenditures by cable operators and likely increases in the charges assessed against cable subscribers (App. A, 77-79). However, it is "plainly incorrect" to set aside regulations on constitutional grounds merely because those regulations may, to some cable operators, seem confiscatory. *Midwest Video I,* 406 U.S. at 658 & n.16; *see also id.* at 673-74 & n.31. Similarly, it is "beyond the competence of the [c]ourt of [a]ppeals . . . to assess the relative risks and benefits of cablecasting," *id.* at 674, whether that cablecasting takes the form of origination programming, at issue before, or access programming, which is now in issue.

[18] *Television Digest,* Vol. 18, No. 13, March 27, 1978 (totals as of January 1, 1978). By September 1, 1977, 465 systems possessed 13 to 20 channel capacity; 501 systems had over 20 channel capacity. The growth of cable systems offering pay cable programming—*i.e.*, entertainment and sports for which a per-channel or per-program additional monthly fee is charged—has been explosive: from 97 systems in 1975 to 530 in 1977. *See TV Factbook,* Services Vol. 47 (1978 ed.) 73a-76a; *Id.*, Services Vol. 45 (1976 ed.), 73a-75a.

cable systems to add to the number of outlets of communication and to increase the diversity of public program and service choices. 406 U.S. at 651.[19]

Cable's growth and potential demonstrate the need for unified regulation integrating that service into the national telecommunications structure. Congress intended the Commission to have sufficient authority to facilitate the orderly assimilation of new developments, such as cable television. *Southwestern*, 392 U.S. at 172-173; *Midwest Video I*, 406 U.S. at 660-61; *see also General Telephone of California* v. *FCC*, *supra*, 413 F.2d at 398. If the decision below is permitted to stand, that unified regulation of the important medium of cable television will be seriously jeopardized.

The Commission has properly exercised both its authority and discretion in developing its access policy. Its rules provide for precisely the kind of "practicable and desirable" access procedures mentioned by this Court in *CBS* v. *DNC*, *supra*, with specific reference to the 1972 access rules. 412 U.S. at 131. The decision of the court below eliminates the Commission's role in formulating uniform and reasonable access standards, and opens the door for disparate

[19] In one of the Commission's earliest discussions of the possibility of an access requirement, it observed that cable television offers the promise of "20-40 or more" programming channels. The Commission added that, from the standpoint of diversity of programming sources, "it seems beyond dispute that one party should not control the content of communications on so many channels into the home." *First Report and Order*, *supra*, 20 FCC 2d at 205.

local or state regulation of the vital access aspect of cable television's development.[20] Thus, this case presents a question of great importance as to the Commission's capacity to implement its statutory mandate and integrate new media into the national communications structure.

CONCLUSION

The Court should grant the writ of certiorari.

Respectfully submitted.

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[20] This assumes, of course, that state or local regulation of access requirements would be constitutionally permissible. *See* n.16, *supra* at 16.

CONSTITUTIONAL PROVISIONS

AMENDMENT I

Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

AMENDMENT V

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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Respondents

STATEMENT OF AMERICAN BROADCASTING COMPANIES, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF AMERICAN BROADCASTING COMPANIES, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

American Broadcasting Companies, Inc., ("ABC"), by its attorneys, respectfully asks this Court to issue a writ of certiorari, as requested by the Federal Communications Commission, to review the decision of the Court of Appeals for the Eighth Circuit in this case.

PETITION OF THE FEDERAL COMMUNICATIONS COMMISSION

The petition of the Federal Communications Commission ("Commission") for writ of certiorari sets forth the questions presented, the relevant facts, the jurisdiction of this Court and the constitutional and statutory provisions

involved. ABC adopts these showings made by the Commission in its petition.

REASONS FOR GRANTING THE WRIT

A. Conflict Among Circuit Decisions On The Commission's Jurisdiction To Regulate The CATV Industry.

The opinion of the Eighth Circuit holds that regulation of cable television systems to require public access and related public service is beyond the Commission's jurisdiction. As shown by the Commission in its petition, that holding is inconsistent with the opinion of this Court in *Midwest* [1] and is irreconcilable with a 1975 opinion of the Ninth Circuit which considered and affirmed the validity of the Commission's earlier cable access rules.[2]

In addition, the District of Columbia Circuit has recently held that the Commission does not have jurisdiction to regulate pay cable services [3] while the Second Circuit has also recently held that the Commission has jurisdiction to preempt state and local regulation of pay cable services.[4]

These various opinions present serious confusion and conflict as to the authority of the Federal Communications Commission, as well as of state and local bodies, to regulate the very important and rapidly expanding cable television industry.[5]

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[1] *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972).

[2] *American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975).

[3] *Home Box Office* v. *FCC*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 111 (1977).

[4] *Brookhaven Cable TV, Inc.* v. *Kelly*, Nos. 77-6165, 77-6157 (2d Cir. March 29, 1978).

[5] See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968).

B. Conflict Among Circuit Decisions On Constitutional Issues.

The Eighth Circuit's opinion herein went on to express the view that invalidating the access rules was necessary for constitutional, as well as jurisdictional, reasons. These constitutional views, principally based on this Court's opinion in *Miami Herald* [6] are in major conflict with opinions of this Court in *Red Lion* and *CBS* [7] as the Commission shows in its petition.

C. The Importance of The Issues Presented.

Ten years ago this Court, in affirming the Commission's assertion of jurisdiction to regulate cable television, observed that the "significance of its [the Commission's] efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population. The Commission has reasonably found that the successful performance of these duties demands prompt and effacious regulation of community antenna television systems." [8] At that time there were an estimated 2.8 million cable television homes in the United States and pay cable services did not exist. In the intervening 10 years, cable television subscribers have increased to an estimated 13 million and pay cable subscribers have increased from none in 1972 to an estimated 1.6 million in 1978.[9]

The opinion of the Eighth Circuit deprives the Commission of authority to implement important aspects of its

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[6] *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

[7] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); *CBS* v. *Democractic National Committee*, 412 U.S. 94 (1973).

[8] *United States* v. *Southwestern Cable Co.*, *supra* at 177.

[9] 47 *Television Factbook*, Services Volume 76-a (1978 ed.); Paul Kagan Associates, Inc., 201 *Cablecast* 3 (March 22, 1978).

cable regulatory program and raises serious questions as to the Commission's overall regulatory authority in the important cable television industry. The confusing and conflicting series of decisions below have placed in doubt the capacity of the Commission to undertake "prompt and effacious regulation of community antenna television systems" which this Court has found necessary for the protection of the public.

We respectfully suggest that this Court should accept review.

Respectfully submitted,

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June 2, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1575

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

MIDWEST VIDEO CORPORATION, et al.,
Respondents.

No. 77-1648

AMERICAN CIVIL LIBERTIES UNION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
and UNITED STATES OF AMERICA,
Respondents,

AMERICAN BROADCASTING COMPANIES, INC., et al.,
Intervenors.

No. 77-1662

NATIONAL BLACK MEDIA COALITION, CITIZENS FOR CABLE AWARENESS IN PENNSYLVANIA, and PHILADELPHIA COMMUNITY CABLE COALITION,
Petitioners,

v.

MIDWEST VIDEO CORPORATION, et al.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE CONSUMERS UNION OF UNITED STATES, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners,

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Respondents.

MOTION OF CONSUMERS UNION OF UNITED STATES, INC. FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

Consumers Union of United States, Inc. ("Consumers Union") hereby moves the Court, pursuant to Rule 24, for leave to file the accompanying brief *amicus curiae* in support of the Petitions for Writ of Certiorari. Although Consumers Union will not file a brief on the merits, should the petitions be granted, it urges this Court to grant the Petitions for Certiorari in order to consider the issues in this case which very significantly affect consumers.

INTEREST OF AMICUS

Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of family income. Consumers Union's income is derived solely from the sale of *Consumer Reports*, its other publications and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, non commercial grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports*, with more than 1.8 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

Consumers Union will be affected directly by the disposition of the present Petitions. Consumers Union has a significant interest in improving the quality, availability, and access to cable television systems and it represents the interests of its members in obtaining access to cable television systems.

Consumers Union, jointly with the Office of Communications of the United Church of Christ and UNDA-USA (an Association of Catholic Broadcasters) petitioned the Federal Communications Commission pursuant to Title 5 U.S.C. § 553(e) to initiate an investigation and rulemaking to amend the Commission's rules concerning the public service obligations of cable television systems. (F.C.C. Rulemaking Docket No. RM-2985.) That petition is pending. The holding of the Eighth Circuit Court of Appeals in these cases may have a direct impact on Consumers Union's petition for rulemaking and, if allowed to stand, arguably would foreclose the Commission from granting such petition for rulemaking.

The interests presented by Consumers Union in these cases are the interests of consumers in obtaining meaningful access to cable television systems in order to disseminate via cable a variety of information including consumer information. These interests also include the interests of consumers in the development of a viable alternative to the existing broadcast industry structure which would serve such public interest goals as fostering media diversity and local control of information sources. The interests of Consumers Union are not identical to the interests represented by the parties in these cases. Consequently, presentation of Consumers Union's views should assist the Court in making an informed decision with respect to the Petitions for Writ of Certiorari.

Although Consumers Union obtained the consent of Petitioner Federal Communications Commission, Petitioner American Civil Liberties Union, and Petitioners National Black Media Coalition, et al., to the filing of this brief, it was unable to obtain consent from the Respondent, Midwest Video Corporation. Consequently, Consumers Union makes the present motion for leave to file a brief

amicus curiae in support of the Petitions for Writ of Certiorari.

Respectfully submitted,

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IN THE

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Respondents.

BRIEF OF AMICUS CURIAE CONSUMERS UNION OF UNITED STATES, INC. IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* Consumers Union of United States, Inc. ("Consumers Union") in these cases is set forth in the accompanying motion for leave to file this brief.

ARGUMENT

In *Midwest Video Corporation v. Federal Communications Commission*, 571 F.2d 1025 (8th Cir., decided February 21, 1978), the Eighth Circuit held that the Federal Communications Commission's cable television access regulations, promulgated in *Report and Order in Docket No. 20508*, 59 F.C.C. 2d 294 (1976), exceeded the Commission's jurisdiction. For the reasons set forth below, this Court should grant the Petitions for Writ of Certiorari and accord plenary review to these cases, giving due consideration to the consumer interests involved.

I
THE JURISDICTIONAL QUESTION

The Eighth Circuit incorrectly analyzed the applicable precedents governing the exercise of Federal Communications Commission jurisdiction over cable television.

In *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), this Court employed a two-tiered analysis in determining that the Commission properly had exercised jurisdiction over cable television, a technology for which the Communications Act of 1934, as amended, provides no specific guidance. First, the Court held that Section 2(a)

of that Act, 47 U.S.C. § 152(a), gives the Commission the *power* to regulate cable. 392 U.S. 157, 173. See also, *United States v. Midwest Video Corporation*, 406 U.S. 649 (1972) (hereinafter, *Midwest Video I*). The Court then proceeded to define the *scope* of that power. It held that the Commission has the authority to issue such cable regulations, based upon the power found in Section 2(a), as are "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting." 392 U.S. at 178.

In *Midwest Video I, supra*, the Court construed the *scope* of the Commission's authority in order to determine whether it had properly issued program origination rules. The question of the Commission's power under Section 2(a) to issue the rules governing "cablecasting" was not contested by the parties. 406 U.S. 649, 662. The plurality opinion emphasized that the application of the "reasonably ancillary" test for limiting the scope of jurisdiction was not intended to confine the Commission to promulgating only cable rules and regulations which would protect the broadcast industry. 406 U.S. 694, 664. And the concurring opinion of Mr. Chief Justice Burger emphasized that "until Congress acts, the Commission should be allowed wide latitude [in regulating cable television.]" 406 U.S. 649, 676.

However, the Eighth Circuit appears to have applied rigidly a rule that the Commission's only business in regulating cable television is to ensure that cable does not compete successfully for the same markets as do local broadcasters, a rule which is contrary to the holding in *Midwest Video I, supra*, 406 U.S. at 664. It failed to give the Commission the flexibility suggested in the concurring opinion in that case. And it failed to examine Section 2(a) to find the source of power on which the Commission's actions in

this case are based, contrary to the holding of this Court in *Southwestern Cable Co., supra.*

The depth of the Eight Circuit's fundamental error is apparent in the language of its opinion:

> The present rules are not designed to govern some deleterious interrelationship of cable systems to broadcasting, or to require that cable systems do what broadcasters do, but relate to cable systems alone, and are designed to force them into activities not engaged in or sought; activities having no bearing, adverse or otherwise, on the health and welfare of broadcasting. 571 F.2d 1025, 1038. (footnote omitted.)

Thus, mistaking the "reasonably ancillary" test as one for determining the source of the Commission's power, rather than as one for determining the scope of the Commission's power, the court below erroneously held that the Commission had no jurisdiction to promulgate the rules here in issue.

Because the Eighth Circuit failed to apply the Court's holding in *Southwestern Cable Co.* that Section 2(a) is the source of the Commission's jurisdiction to regulate cable television, because it applied the "ancillary jurisdiction" test to determine the source of power, rather than the scope of power as provided in *Southwestern Cable Co.*, and because it failed either to divorce the Commission's jurisdiction over cable from the mere protection of broadcasters' interests or to permit the flexibility of regulation suggested in *Midwest Video I,* the decision below is erroneous.

If the Eighth Circuit Court of Appeals decision is allowed to stand, the law governing the Commission's jurisdiction over cable will become less clear than it now is because the

analysis of the Court of Appeals directly contravenes the Court's holdings in *Southwestern Cable Co.* and *Midwest Video I, supra.*

Contradictory interpretations of *Southwestern Cable Co.* and *Midwest Video I, supra,* by two other Circuit Courts of Appeals indictate the potential for widely conflicting holdings among the Circuits, which also lessens the clarity and predictability of the law. For example, the Ninth Circuit Court of Appeals stated in *dicta* that the Commission may have the power to regulate cable under the common carrier provisions of Title II of the Communications Act of 1934, as amended, and may choose to exercise such power in the future. *American Civil Liberties Union v. Federal Communications Commission,* 523 F.2d 1344 (9th Cir., 1975). Conversely, in *National Association of Regulatory Utility Commissioners v. Federal Communications Commission,* 533 F.2d 601 (D.C. Cir., 1976), the D.C. Circuit reasoned that the two-way capability of cable technology is a common carrier activity and hence not subject to Commission regulation, because such regulation would not meet the "reasonably ancillary to broadcasting" test as set forth in *Midwest Video I.*

Such conflicting interpretations stem in large part from the hybrid nature of cable technology. As noted by the Court in *Southwestern Cable Co., supra,* cable television has "characteristics both of broadcasting and of common carriers, but with all of the characteristics of neither . . ." 392 U.S. 157, 172. Thus, the attempt to coerce certain aspects of cable technology or cable regulation into a pre-existing regulatory structure applicable either to broadcasting or to common carriers represents a wooden analysis of essentially flexible legal precedents already established by the Court.

In *Southwestern Cable Co., supra,* the Court expressly reserved decision on the source and scope of the Commission's authority to regulate cable "under any other circumstances or for any other purposes." 392 U.S. 157, 178. Given the circumstances and purposes of the access rules at issue here, the facts of this case may present the Court the opportunity to clarify the Commission's jurisdiction over cable television. Since the facts in that case and in *Midwest Video I, supra,* concerned only the cable operators' function as retransmitters of broadcast television signals, the Court appropriately looked to the Commission's regulation of broadcasting in formulating the test for determining the scope of the Commission's regulatory power. However, as noted by both the Ninth Circuit and the District of Columbia Circuit, the access channels which would be required by the rules at issue in these cases appear to be the functional equivalents of common carrier channels of communication. Thus, the Ninth Circuit indicated that such functions could be regulated appropriately pursuant to the common carrier provisions of Title II of the Communications Act of 1934, as amended.

The Court's review of these cases would clarify many of the issues which have arisen since *Midwest Video I, supra,* and provide the Commission and the lower courts with guidance as to the Commission's jurisdiction over cable. The Court would have the opportunity to undertake a functional analysis of the relationship between the access rules here at issue and the common carrier analog suggested by the Ninth and District of Columbia Circuits. It would have an opportunity to determine whether the limitations upon exercise of the Commission's Section 2(a) power must be measured solely by the "ancillary to broadcasting" test enunciated in *Southwestern Cable Co.* and *Midwest Video I, supra,* or whether exercise of that jurisdiction, additionally or alternatively, may fall within and be governed by the common carrier provisions of Title II of the Act, as argued below by Petitioner American Civil Liberties Union. (See Petitioner American Civil Liberties Union Petition for Writ of Certiorari, 11, n.9). The Court, by continuing the analysis begun in *Southwestern Cable Co.* and by examining the interstices of the entire Communications Act of 1934, could re-evaluate the limitations on the Commission's authority over cable and provide the analytical guidance necessary to ensure even-handed and predictable regulation of cable television.

II.

THE IMPORTANCE OF THE CASE

Amicus recognizes that the exercise of the Commission's regulatory jurisdiction over cable television has been marked by Commission vacillation and self-reversal, with respect both to the question of its own jurisdiction and to its substantive rules. However, for the reasons articulated below, the Commission must be permitted to develop cable access policies which will further its long-established policy goals.

As the Court recognized in *Southwestern* and *Midwest Video I, supra,* the Commission's long-established goals of localism and fostering diversity in communications generally remain viable but still unrealized objectives. The possibility of cable television increasing the number of outlets for community self-expression and for augmenting the public's choice of programs and other communications services remains an objective of critical public importance which should not be forsaken. The Commission should not be ordered to withdraw from the field at this juncture, but should be provided the judicial guidance neces-

sary for it to fulfill its mandate to ensure that the public interest is served by all of the electronic media.

Equally important, many of the Commission's goals with respect to common carrier regulation also are applicable in the context of the cable television industry. These include the provision of communications services of the best quality for the least possible cost, prevention of concentration of power and centralized control of the communications media, prohibition of anti-competitive practices, and equalization of competitive opportunities between various communications entities.[1]

As in the rest of the economy, control of the various electronic media tends toward increasing concentration. Such control over information sources has significant implications for consumer choice, as well as for our form of government, if not counter-balanced by a right of ordinary citizens to access to those information sources.[2] The rules at issue in these cases, as well as the prospective rules which the Commission might determine to promulgate after investigation and rulemaking if not precluded by the decision below, are directly related to such access and, therefore, to the very significant issues of consumer choice and our system of government.

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[1] See Berman, *CATV Leased Access Channels and the FCC: The Intractable Jurisdiction Question*, 51 Notre Dame Lawyer 145 (1975).

[2] See Barrow, *The New CATV Rules: Proceed on Delayed Yellow*, 25 Vanderbilt L.R. 681 (1972); see also *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, *supra*, 533 F.2d 601, 632-633 (Wright, J., dissenting).

CONCLUSION

The Court should grant the Petitions for Writ of Certiorari because of the erroneous interpretation of existing law by the Eighth Circuit and because of the importance of upholding the Federal Communications Commission's regulatory jurisdiction over the public service obligations of the cable television industry.

Respectfully submitted,

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June 2, 1978

77-1575

No.

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER

v.

MIDWEST VIDEO CORPORATION, ET AL.

PETITIONER'S APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1496

MIDWEST VIDEO CORPORATION, PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA, RESPONDENTS.

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,
INTERVENORS.

No. 76-1839

AMERICAN CIVIL LIBERTIES UNION, PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA, RESPONDENTS.

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,
INTERVENORS.

On Petition for Review of an Order
of the Federal Communications Commission

Submitted: September 12, 1977
Filed: February 21, 1978

Before STEPHENSON, Circuit Judge, WEBSTER, Circuit Judge, and MARKEY, Chief Judge.*

MARKEY, Chief Judge.

Petitioners, Midwest Video Corporation (Midwest) and the American Civil Liberties Union (ACLU), seek review of the Federal Communications Commission's (Commission's) *Report and Order in Docket No. 20508*, 59 F.C.C.2d 294 (released May 13, 1976), *reconsideration denied*, 62 F.C.C.2d 399 (released December 21, 1976) (*1976 Report*) [1] imposing mandatory access and channel capacity requirements upon certain cable television systems.[2]

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* The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

[1] The *1976 Report* modifies and replaces earlier regulations on mandatory access and channel capacity, *Cable Television Report and Order*, 36 F.C.C.2d 143, *affirmed on reconsideration*, 36 F.C.C.2d 326 (1972) (*Cable Report*). Our holding, that the access rules of the *1976 Report* exceed the jurisdiction of the Commission, carries with it the substantially identical, though more onerous, rules of the *Cable Report*.

[2] Community-wide, coaxial cable television systems were earlier called "Community Antenna Television" or "CATV" systems. The Commission now uses the more inclusive "cable television," *Cable Report*, as do we. *See* 47 C.F.R. § 76.5(a) (1976).

Midwest challenges the regulations as (1) inadequately supported by the record, (2) beyond the jurisdiction of the Commission, (3) violative of the free speech clause of the First Amendment, and (4) violative of the due process clause of the Fifth Amendment.

ACLU does not challenge the Commission's jurisdiction to issue the *1976 Report* regulations, but objects to the softening modifications made to the 1972 *Cable Report* access rules,[3] alleging that the modifications (a) lack rational basis in their failure to consider interests of access program producers, (b) violate the Commission's mandate to regulate cable television as a common carrier, and (c) do not fully achieve general First Amendment goals.[4]

We grant the petition for review and set aside the order because it exceeds the jurisdiction of the Commission.

Background

As the cable television industry sought to develop over the past twenty-five years, the Commission's

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[3] *See* note 1 *supra*.

[4] Briefs *Amicus Curiae* or as Intervenors were filed by National Cable Television Association, Inc.; Teleprompter Corporation; National Black Media Coalition, Citizens For Cable Awareness in Pennsylvania, and Philadelphia Community Cable Coalition, jointly; and Coldwater Cablevision Incorporated and Michigan CA-TV Company, jointly.

effort to regulate it has led to numerous Commission proceedings, voluminous litigation, and substantial literature.[5]

A cable system is composed of an antenna, to pick up local and distant broadcast signals, and cables for transmitting those signals to the home television sets of the system's paying subscribers. Some systems have employed the services of microwave companies for long distances between their antennae. The cable system may also transmit its own programs, *i.e.*, "cablecast," through its cables to its subscribers. For technical reasons, most cable systems began with 12 channels.[6]

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[5] Of the extensive commentary, these are representative: Barrow, *Program Regulation in Cable TV: Fostering Debate in a Cohesive Audience*, 61 Va. L. Rev. 515 (1975); Bretz, *Public Access Cable TV: Audiences*, J. of Com., Summer 1975 at 15; Doty, *Public Access Cable TV: Who Cares*, J. of Com., Summer 1975 at 23; Price, *Requiem for the Wired Nation: Cable Rulemaking at the FCC*, 61 Va. L. Rev. 541 (1975); Lapierre, *Cable Television and the Promise of Programming Diversity*, 42 Fordham L. Rev. 25 (1973); S. Rivkin, Cable Television: A Guide to Federal Regulations (1973); Barrow, *The New CATV Rules: Proceed on Delayed Yellow*, 25 Vand. L. Rev. 681 (1972); Park, *Cable Television, UHF Broadcasting, and FCC Regulatory Policy*, 15 J. Law & Econ. 207 (1972); Posner, *The Appropriate Scope of Regulation in the Cable Television Industry*, 3 Bell J. Econ. & Mtg. Sci. 98 (1972); R. Smith, The Wired Nation: Cable TV: The Electronic Communications Highway (1972); Sloan Commission on Cable Communications, On the Cable: The Television of Abundance (1971); Note, *The Wire Mire: The FCC and CATV*, 79 Harv. L. Rev. 366 (1965).

[6] The 12 channels are in the "low band" and "high band" portions of the MHz spectrum. The 20 channel capacity requirement in the *1976 Report* necessitates use of the "mid-band," and a concomitant expense of construction and rebuilding.

Technophiles say that present technology enables installation of as many as 80 channels, and that the advent of laser-ray carriage of television signals, with virtually unlimited channels, may replace cable. *See* Field, *Laser Video Is Intriguing, But Is It Useful?* N.Y. Times, Sept. 18, 1972, at 37, col. 3.

Having decided to preserve the "national television service" as it existed in 1952, *Sixth Report and Order on Rules Governing Television Broadcast Stations*, 17 Fed. Reg. 3905 (1952), the Commission initially ignored cable television, considering it no threat to broadcasting or to its regulatory domain. On receipt of broadcaster complaints in 1958, the Commission ruled that cable systems were not common carriers and refused to regulate them. *Frontier Broadcasting Co.*, 24 F.C.C. 251, 253-54 (1968), *aff'd, Report and Order on Inquiry Into the Impact of Community Antenna Systems, Television Translators, Television "Satellite" Stations, and Television "Repeaters" on the Orderly Development of Television Broadcasting*, 26 F.C.C. 403, 441 (1959). The Commission's position that cable systems were not engaged in common carrier operations was upheld in *WSTV, Inc.*, 23 Rad. Reg. (P-H) ¶ 184 (1962) and in *Philadelphia Television Broadcasting Co.* v. *FCC*, 359 F.2d 282, 284, (D.C. Cir. 1966). In all this, the Commission decided that it had no jurisdiction over cable television as common carriers under Title II of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.* (1970) (Act),

or as broadcasters under Title III of the Act, and that it had no plenary power to regulate an industry just because that industry may have an impact on broadcasting, over which it did have jurisdiction.[7]

Becoming persuaded, and announcing with admirable candor, that cable systems might represent a competitive threat to its regulatees in television broadcasting, the Commission decided to assert jurisdiction.[8] The Commission's approach to Congress for appropriate statutory authority was frustrated. To date, the Congress has refrained from exercising its legislative authority to provide that

[7] The Commission candidly and repeatedly admitted an inability to determine the *fact* of adverse impact, *Report and Order on Inquiry, supra,* 26 F.C.C. at 421-22, 424, 436; *First Report and Order on Grant of Authorizations in the Business of Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems,* 38 F.C.C. 683, 710-11 (1965), and *Second Report and Order on Grant * * * Antenna Systems,* 2 F.C.C.2d 725, 773, 781 (1966). Yet the Commission refused a request for an experiment to test impact, *Suburban Cable TV Co.,* 9 F.C.C.2d 1013 (1967).

[8] Whether agencies become captives of their regulatees, and whether the "barter process" before agencies must be accepted in place of "ideal" rulemaking, *see* Jaffe, *The Illusion of the Ideal Administration,* 86 Harv. L. Rev. 1183 (1973), and whether, to use an imperfect analogy, the motion picture industry could have advanced as rapidly against vaudeville under a Federal Entertainment Commission, or the airlines as rapidly under a Federal Transportation Commission regulating railroads and airlines, the wisdom and implications to social progress of a regulatory system that enlists the power of government to preserve established industry against new technological competition, as distinguished from reliance on consumer preference at a perceived risk of market chaos, is a matter for the Congress, not the courts.

the Commission shall or shall not regulate cable systems, and, if they shall, in what manner and to what purpose and extent. The subject of cable regulations has thus been left substantially entirely to the Commission and the Courts.[9]

Proceeding on its own, the Commission has attempted not just to keep pace, but to anticipate the course of communications advances, facing the virtually impossible task of outrunning our modern technological juggernaut. Beginning with indirect regulation through its jurisdiction over microwave companies used by some cable systems, and exhibiting an apparent hostility toward letting cable grow as its own ingenuity and consumer acceptance may have dictated, the Commission imposed an extended "freeze" on cable's growth, *see Wentronics, Inc.* v. *FCC,* 331 F.2d 782 (D.C. Cir. 1964).

The Commission has since attempted to frame a place for cable television while preserving broadcast television intact. The effort has resulted in the establishment of a Cable Television Bureau under the

[9] A bill giving the Commission full licensing authority over cable television failed on the Senate floor. S. 2653 S. Rep. No. 923, 86th Cong., 1st Sess. (1959). The Commission's own legislation was introduced in 1961. S. 1044 and H.R. 6840, 87th Cong. 1st Sess. (1961). Congress took no legislative action. The matter was again considered in 1965 and 1966. Hearings on H.R. 7715 Before the Subcomm. on Communications and Power of the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess. (1965); Hearings on H.R. 12914, H.R. 13286, and H.R. 14201 Before the House Committee on Interstate and Foreign Commerce, 89th Cong., 2d Sess. (1966).

Commission, and 60 pages of cable regulations at 47 C.F.R. §§ 76.1-78.115 (1976).[10] As a substitute for the license it is statutorily empowered to grant or refuse to broadcasters, the Commission issues a "Certificate of Compliance," for cable operators. 47 C.F.R. § 76.11. It sets for state and local franchising authorities the conditions they may impose on cable enterprises seeking a franchise to string cable underground or on poles. 47 C.F.R. § 76.31. It requires cable operators to submit forms and reports. 47 C.F.R. §§ 76.401-411.

Much of the Commission's cable-regulating has involved the planting of new and dramatic seeds of regulation, based on soaring, euphoric predictions (some from cable owners) of great things to come from cable television, seeds which had to be plowed under, when germination failed in the bright sunlight of commercial, economic, and technological reality.[11]

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[10] Cable owners may welcome the Commission, as regulator-protector-servant. Dealing *en masse* with the Commission, which dictates to local franchising authorities, 47 C.F.R. § 76.258, may be easier than facing those authorities one-on-one; the Chief of the Cable Television Bureau desired to regulate pay movies in hotel rooms as competitors to cable television. *12 Weekly TV Digest*, Oct. 16, 1972 at 2. Cable and broadcast industries may one day require "protection" against the threat that direct satellite-to-home television will replace both.

[11] For more detailed discussion of: (1) the potential technological capacities of cable telecommunications; (2) the Commission's initial declination of jurisdiction; (3) its later, growing effort to regulate; (4) its changes in justification, from

The Commission's jurisdiction over cable retransmission of distant (Los Angeles) broadcast television signals into a local (San Diego) broadcast station's "contour" was upheld as "reasonably ancillary" to its regulatory responsibilities for broadcast television in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). In the following year, the Commission adopted a "mandatory origination" rule, requiring cable systems with over 3499 subscribers to originate some programs of their own. *First Report and Order in Docket No. 18397*, 20 F.C.C. 201, 202-04 (1969). This court set that rule aside as beyond the Commission's jurisdiction. *Midwest Video Corp.* v. *United States*, 441 F.2d 1322 (8th Cir. 1971). In a split decision, the Supreme Court reversed, sustaining the mandatory origination rule as also "reasonably ancillary" to the Commission's responsibilities for broadcast television. *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972).[12]

Having carried the fight to victory in the Supreme Court, the Commission never enforced its mandatory

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protection of local VHF broadcasting stations, to fostering of UHF growth, to a fight against "unfair competition;" (5) the utopian forecasts of cable's potential, and ensuing disappointments; and (6) the oft-repeated pattern of regulations withdrawn, waivered, and abandoned, see the literature listed in note 5, *supra*, particularly Lapierre, *Cable Television and the Promise of Programming Diversity*, 42 Fordham L. Rev. 25 (1973), and Price, *Requiem For the Wired Nation: Cable Rulemaking at FCC*, 61 Va. L. Rev. 541 (1975).

[12] Four Justices joined a plurality opinion; four dissented. The Chief Justice concurred in the result.

origination rule.[13] Instead, it conducted new proceedings, leading to the 1972 *Cable Report*, imposing "mandatory access" rules, under which cable systems in the largest 100 markets, were required, *inter alia*, to build a 20-channel capacity, to reserve three "access" channels for free use by public, educational, and governmental bodies, and to reserve a fourth channel for leased access. 36 F.C.C.2d at 240-41. All access was to be on a first come, nondiscriminatory basis, with no control by cable operators over program content. A compliance deadline of March 31, 1977 was set.[14]

In 1974, the Commission formally rescinded the mandatory origination rule, 39 Fed. Reg. 43302, and simultaneously issued rules on equipment availability, *Report and Order in Docket No. 19988*, 49 F.C.C.2d

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[13] In *Midwest Video, supra,* 441 F.2d at 1328, this court said it was "highly speculative whether there is sufficient expertise or information available to support a finding that the origination rule will further the public interest." In reversing, the plurality considered that holding "patently incorrect" 406 U.S. at 671.

[14] Midwest was not operating in one of the top 100 markets and its standing to challenge these rules would have been doubtful. *See Midwest Video Corp.* v. *United States, supra,* 441 F.2d at 1328. ACLU complained of the Commission's failure (1) to impose common carrier obligations, and (2) to limit cable owners to one channel. The Ninth Circuit denied ACLU's petition for review. *American Civil Liberties Union* v. *FCC,* 523 F.2d 1344 (9th Cir. 1975). The Commission emphasizes here a phrase of the opinion in that case as indicating judicial approval of its access rules, but there was no challenge to its jurisdiction to issue its access rules before that court.

1090 (1974), requiring cable systems with over 3499 subscribers to purchase, and make available to the public, equipment for producing local programs and cable time for their presentation. Midwest petitioned this court for review but withdrew its petition as moot in view of the challenge here to the *1976 Report*, which merged the equipment availability and mandatory access rules. *Midwest Video Corp.* v. *FCC*, No. 75-1671, *dismissed on petitioner's motion* (8th Cir. April 12, 1976).

In March, 1974, the Commission appointed task forces to investigate the effect of the 1972 *Cable Report* rules. In responding to the task forces' report, the Commission invited comment on postponement of the March 31, 1977 deadline, *Notice of Proposed Rulemaking in Docket No. 20363*, FCC 75-211, 51 F.C.C.2d 519 (Released Feb. 26, 1975), and acknowledged concerns of various parties that: (1) industry revenues were insufficient to create new plants, distribution networks, amplifiers, converters, and modulators; (2) more time was needed to build revenue; (3) the poor economy and large debt of most cable systems meant they were unable to borrow for non-revenue producing activities; and (4) the Commission was unreasonable in expecting financial interests to provide capital while it required franchise authorities to enforce access and equipment rules, a process entailing the cable system's very authority to operate. The Commission received estimates that the cost of rebuilding to meet the 1972 rules was between $133 million and $430 million.

In its *Notice of Proposed Rulemaking in Docket No. 20508*, 53 F.C.C.2d 782, 784 (Released June 27, 1975), the Commission added to deadline postponement consideration of alternative methods by which "we might reaffirm our commitment to access cablecasting while recognizing the economic realities of today's marketplace." It noted the substantial cost of technological changes required by its 1972 access rules and great variances in the burden on different cable systems.

In its *Notice* in Docket No. 20508, *supra*, the Commission rejected all suggestions that it require construction of channel capacity and provision of access only upon indication of community demand for such services. The suggesters felt that in many communities the channels and equipment would go unused, yet the cost would be borne by cable consumers ("subscribers") totally uninterested in viewing access programs. The Commission said, "[W]hile we may consider this approach at some point in the future, we do not believe for the following reasons that the general adoption of an approach strictly tied to demand would at this time be wise." [15] The Commission listed ten "reasons": (1) cable television is new and evolving; (2) availability [16] of cable channels for dissemination of in-

[15] How adoption of a demand-governed approach *after* construction could save the construction costs was not explained.

[16] Of course access channels were not actually "available" on most systems, hence the Commission's felt need to order their construction.

formation is even newer; (3) demand for access services is a function of community awareness of their existence; (4) awareness and full utilization of cable's potential requires time; (5) some older systems have provided minimal access on a voluntary basis or no access; (6) in those communities awareness has not had opportunity or time to develop; (7) if its requirements resulted in blank channels, it believed that would shorten the time to realize the full potential for access services, because blank channels are visible and continuing inducements to be filled; (8) it considered that true for the channel user and the system operator; (9) if it required the system operator to provide access channels, he could be expected to encourage their use; (10) if it now altered its rules to reflect existing demand for access services, it would raise a barrier to growth of that demand and a disincentive to new services "we expect of cable." 53 F.C.C.2d at 787, 788.

Though the Commission said "There is mounting evidence that access cablecasting in an increasing number of communities is beginning to fill that need," Commissioner Robinson stated, "If the commission has such evidence they have kept it remarkably well hidden from me." 53 F.C.C.2d at 801.

Commissioner Quello suggested deference to local franchise authorities, who might require one access channel "upon demand and need therefore," and called on the Commission to obtain "practical, statistical data on current uses of cable facilities" and to project the future based "on statistical data rather

than 'blue sky' expectations as in the past," saying, "In short, I think the Commission has burdened the cable industry unnecessarily with requirements and restrictions which cannot be statistically or practically supported." 53 F.C.C.2d at 799.

On May 13, 1976, having invited and received comments, the Commission released its *Report and Order in Docket 20508*, the *1976 Report* here under review.

The *1976 Report* rescinded earlier requirements based on assumptions admittedly proven false, and made three major changes in the 1972 mandatory [17]

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[17] We deal here only with *mandatory* access. Nothing in present law or in this opinion precludes a cable system operator from voluntarily providing public access.

Moreover, the present case involves only the jurisdiction of the Commission to issue its Federal access and equipment rules. The only direct effect of our opinion on the election of local franchising authorities, to require or waive access requirements in the light of community need and interests, is to free those authorities from the Commission's restrictions, found in 59 F.C.C.2d at 324-25. 47 C.F.R. § 76.258.

The Commission mis-relies on the presumed right of franchising authorities to condition local franchises on provision of access channels as justification for its doing so. The Commission's jurisdiction must come from Congress, not from local authorities.

ACLU implies the demise of all public access if mandatory access rules are not upheld. Nothing of record so indicates. Conjecture could equally invisage voluntary continuation and expansion of existing access programs. In all events, the Commission's jurisdiction is not expandable through application of unauthorized regulations, nor can application convert unauthorized regulations into authorized regulations, over the short term and prior to direct court challenge.

Though ACLU argues that mandatory access must be continued to protect the "investment" of present access users, no one can be said to have reasonably relied on, or established an equity in continuation of, Commission cable regulations which have been consistently and continually revised, unenforced, withdrawn, waivered, and abandoned. Nor may vested interests be normally acquired in continuation of regulations exceeding *ab initio* the jurisdiction of the issuing agency.

access rules. First, it applied them to all cable systems with over 3499 subscribers, eliminating the top 100 markets criteria. 59 F.C.C.2d at 303-06; 47 C.F.R § 76.252-56 (1976). Second, it extended the March 31, 1977, deadline for compliance with the 20-channel construction requirement to June 21, 1986, for most, but not all, existing systems. 59 F.C.C.2d at 321-24; 47 C.F.R. § 76.252(b) (1976).[18] Third, it required four access channels only of systems having sufficient capacity and demand for full time access, requiring other systems to conglomerate access on one or more channels. 59 F.C.C.2d at 314-16; 47 C.F.R. § 76.254 (1976).

Thus an evolutionary process has led to the Commission action under review, the *1976 Report*, which provides:

> (1) that operators of cable systems having 3500 or more subscribers designate at least four channels for access users, one channel each for public access, education access, local government access, and leased access. 47 C.F.R. § 76.254(a).

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[18] The March 31, 1977 deadline was previously cancelled in *Report and Order in Docket No. 20363*, 54 F.C.C.2d 207 (1975). Petition for review is pending in *National Black Media Coalition* v. *FCC*, D.C. Cir. Appeal No. 75-1792, a case held in abeyance pending outcome of these consolidated cases.

(2) that, until demand exists for full time use of all four access channels, access programming may be combined on one or more channels. 47 C.F.R. § 76.254(b).

(3) that at least one full channel for shared access be provided, but if a system had insufficient activated channel capacity on June 21, 1976, it could provide whatever portions of channels are available for such purposes. 47 C.F.R. § 76.254(c).

(4) that at least one public access channel be forever supplied without charge. 47 C.F.R. § 76.256(c)(2).

(5) that a reasonable charge for production costs may be charged for live studio programs longer than five minutes. 47 C.F.R. § 76.256(c)(3).

(6) that operators establish rules providing for access on a first-come, nondiscriminatory basis and prohibiting the transmission of lottery information, obscene or indecent matter, and commercial and political advertising. 47 C.F.R. § 76.256(d)(1) (on public channel). 47 C.F.R. § 76.256 (d)(2) (on educational channels).[19]

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[19] In its *Clarification of Section 76.256 of the Commission's Rules and Regulations*, 59 F.C.C.2d 984, 986 (1976), the Commission amended these regulations to provide that cable operators *enforce* the rules which they are required to establish against obscenity and indecency.

In *American Civil Liberties Union* v. *FCC*, No. 76-1695 (D.C. Cir.), ACLU has challenged the rules found at 47 C.F.R. § 76.256(d)(1)-(3) as unconstitutionally imposing a prior censorship obligation on cable operators. Upon an order of the court in that pending case, issued August 26, 1977, 47 C.F.R. § 76.256(d)(1)-(3) has been stayed to the extent that it prohibits the presentation of obscene or indecent matter pending the conclusion of proceedings upon remand to the Commission. However, the Commission may decide not to repeal this provision. Thus, to prevent multiple remands, we view this provision as before us as part of the *1976 Report* as clarified. 59 F.C.C.2d 984.

(7) that cable operators exercise no other control over content of access programs. 47 C.F.R. § 76.256(b).

(8) that educational and local government access be offered without charge for the first five years. 47 C.F.R. § 76.256(c)(1).

(9) that operators establish rules for leased access channels on a first-come, nondiscriminatory basis, requiring sponsorship identification and an appropriate rate schedule, with no control over program content except to prohibit lottery information and obscene or indecent material. 47 C.F.R. § 76.256(d)(3).

(10) that each cable supply equipment and facilities for local production and presentation of access and lease programs. 47 C.F.R. § 76.256(a).[20]

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[20] The Commission interpreted this rule as requiring equipment availability beyond normal business hours, *Reconsideration of Report and Order in Docket No. 20508*, 62 F.C.C.2d 399, 406 (1976), and as not permitting a charge for use of automated services to play tapes and films, *id.* at 407, even if the playing runs longer than five minutes.

The Commission requires cable operators to permit the installation of converters by third parties who wish to use the operators' facilities and who will pass the cost of converters

(11) that equipment in new cable systems have a capacity of two-way, nonvoice communication and a minimum of 20 channels. 47 C.F.R. § 76.252(a).[21]

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to subscribers desiring to view the program of the third party. It also insists that cable operators with limited capacity defer their own programming in favor of access users. "We shall scrutinize the actions of operators who, while providing their own programming, assert that their activated capability is insufficient to permit the leasing of a channel to potential competitors." *1976 Report* at 316. The Commission believes that time and weather channels, though of "substantial benefit to subscribers," should also give way to access programs. *Id.* at 316 n.19. If only one channel is available for use by access seekers, the cable operator will be in "bad faith" if he uses that channel for pay programming. *Id.* at 317.

[21] Jurisdiction to require minimum channel capacity and two-way capacity has not been argued separately from the mandatory access requirement. Channel capacity is apparently necessary to provide access channels. The Commission has linked two-way capacity with the 20-channel requirement in the same regulation, apparently because the cost is lower if such capacity be added when the 20 channels are built. The relationship of mandatory access to a two-way capacity requirement is not as clear as that of the 20-channel requirement, but to the extent that two-way capacity relates to the "access concept" or that two-way capacity cannot be separated from the 20-channel requirement, it must fall with the 20-channel and other regulations of the *1976 Report*. If cable systems *offer* two-way communications services, those services may be subject to regulation in accord with their nature, which is distinct from that of program distribution services affected by access requirements.

In adopting its two-way capacity requirement, the Commission recognized that it could not preempt state or local regulation of intra-state, two-way, non-video communications, citing *Nat'l Ass'n of Reg. Util. Comm'rs* v. *FCC*, 533 F.2d 601 (D.C. Cir. 1976). The Commission interpreted that decision narrowly, stating that it did not foreclose authority to order

(12) that cable systems in operation within a major television market before March 31, 1972, and other systems in operation before March 31, 1977, shall have ten years from the effective date (June 21, 1976) of the *1976 Report* to comply. 47 C.F.R. § 76.252(b).

Issue

The dispositive issue is whether the regulations promulgated in the *1976 Report* exceed the Commission's jurisdiction.[22]

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two-way capacity, and that some functions of that capacity relate to broadcast program distribution. 59 F.C.C.2d at 310-11.

In broadcast television, British viewers may acquire the "teletext" device, enabling them to call up on their sets data blocks (100 magazine pages) in which the desired information can be found, or the "viewdata" system, employing telephone lines, for calling up on their sets the specific information desired. *British Hook Up TV To Printed Magazine*, Washington Post, Dec. 25, 1977, at D4. Whether the Commission has considered any requirement for "two way capacity" on broadcast television is not of record.

Two-way capacity service may well acquire consumer interest and demand. *See, e.g., Columbus Folk Can Talk Back When TVs Become Annoying*, The Cincinnati Enquirer, Dec. 1, 1977, at A-6.

[22] Because we hold the regulations under review to have gone too far, it is unnecessary to discuss at length all other contentions raised by Midwest, *amici curiae*, and intervenors, or to treat ACLU's contention that the regulations did not go far enough.

OPINION

I Jurisdiction

The mandatory access, channel capacity, and equipment regulations of the *1976 Report* exceed the Commission's jurisdiction because: (1) the statute provides no jurisdiction; (2) the regulations are not "reasonably ancillary" to the Commission's responsibilities for regulation of broadcast television; (3) objectives do not confer jurisdiction; (4) the Commission's ends do not justify its means; (5) the means are forbidden within the Commission's statutory jurisdiction.

(1) *The Statute and the Commission's Jurisdiction Over Cable Television*

The Commission's charter, its basic grant of power to regulate, is the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* (1970) (Act), in which Congress delegated regulatory authority over (1) common carriers of communications by wire or radio, Title II, 47 U.S.C. §§ 201-21 (1970), and (2) broadcasters using channels of radio transmission, Title III, 47 U.S.C. §§ 301-29 (1970). Because § 3(b) includes "transmission by radio of * * * pictures * * *," 47 U.S.C. § 153(b) (1970), the Act encompasses broadcast television. Cable systems, first developed in the 1950's, are neither common carriers nor broadcasters.[23] Hence the Act contains

[23] In its *1976 Report* and elsewhere, the Commission has recognized that cable systems are neither common carriers nor broadcasters, but has justified its rules by labelling cable systems as a "hybrid" of both, without explanation of how a system, when it does not offer a service of transmitting the communications of others, incorporates any aspect of "common" carriage, or how a system that employs no frequency of the broadcast spectrum to cablecast, and that sends its transmissions only to its own specific subscribers and not into the airwaves, incorporates any aspect of "broadcasting." The operative fact would appear to be that cable systems, because they retransmit broadcast programs, and because their subscribes may also receive over-the-air broadcast programs, may affect the broadcast television industry. Whether that effect be viewed as a competitive threat to broadcasters, as detrimental to conventional television service to the public, or as impeding the legitimate statutory goals of the Act, the Commission has deemed it necessary, in the absence of Congressional guidance, to devote a major effort over recent years to attempted regulation of cable television.

no specific grant of authority over cable systems, and there can have been no Congressional intent regarding them.

Whether the Commission and the courts should relieve Congress of the need to revise statutes in the light of new technology, *General Telephone Co. of Cal.* v. *FCC*, 413 F.2d 390 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 888 (1969),[24] neither the nonexistence of cable technology in 1934, nor Congressional abstention over the past quarter century, need be

[24] Concerning the new satellite communication technology, Congress appears to have had little difficulty in adopting appropriate legislation, *i.e.*, the Communications Satellite Act of 1962, 47 U.S.C. §§ 701-44 (1970). Further, when Congress has wished to include cable systems in a provision of the Act, it has done so. 47 U.S.C. § 314 (1970), *as amended by* Act of Oct. 15, 1974, Pub. L. No. 93-443, Titles II, IV, §§ 205(b), 403, 88 Stat. 1278, 1291.

considered the sole reason for the present absence of specific, plenary statutory power to regulate the industry called "Cable Television." Neither the basic rationale for regulation of common carriers (to insure fair and equal access to the carrier's service) nor that for regulation of broadcast transmissions (to preclude bedlam on broadcast frequencies), is applicable to cable systems *per se*.

Congressional silence does not, however, end the inquiry in every case. Though a statutory void cannot itself create jurisdiction in an agency, and though neither agencies nor courts receive the legislative powers not exercised by the Congress, the rapid growth of communications technology requires a unified system of regulation, and sufficient flexibility and breadth of mandate to permit an agency, confronted with new technology not covered by statute but having serious impact on technology that is, to adopt such regulations as will enable the agency to protect the public interest.[25]

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[25] As authority for its *1976 Report*, the Commission lists Sections 2, 3, 4 (i) and (j), 301, 303, 307, 308, 309, 315, and 317 of the Act. *1976 Report*, 59 F.C.C.2d at 327. Section 2 states those to whom the statute applies. Section 3 is "definitions." Section 4(i) gives authority for all acts necessary to the Commission's function. Section 4(j) specifies proceedings. Sections 301, 307, 308, and 309 cover licensing of broadcasters. Section 303 covers powers and duties of the Commission. Section 317 covers announcements by broadcasters. Section 315 covers equal time for political candidates. The sole reference to cable systems appears in Section 315. The *1976 Report* has no relation to equal time for political candidates on cable television, which is covered in a separate regulation, 47 C.F.R. § 76.205.

In *GTE Service Corp.* v. *FCC*, 474 F.2d 724 (2d Cir. 1973), the court held that statutory silence did not preclude regulation of the interaction of data processors and common carriers, while denying Commission authority to regulate data processors themselves. And there lies the rub. Regulation to protect the public's vested interest in an established service, against injury from interaction of new technology, is one thing. It is quite another when an agency steps beyond its authority. The former may well be in the public interest. The latter never is.[26]

Respecting the Commission's jurisdiction over cable systems, the Supreme Court has supplied a measure. Under that guidance, the statute is to be given a broad, not restrictive, interpretation. Fur-

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Realism impels recognition that delegation is a necessary part of the modern legislative function. There being no delegation of power over cable systems, we do not here determine a normal "breadth of delegation" question. In a sense, the Commission's rationale, and the Court's "reasonably ancillary" standard, may be analogized to the "necessary and proper" clause, Const. art. I, § 8, cl. 18, applicable to the Congress. If so, the power to issue the present construction and access rules, as discussed *infra*, is not necessary and proper to "carry into execution" the Commission's delegated powers over broadcast television.

[26] That the compliance deadline for some cable systems was rolled forward to 1986, and that the Commission stands ready to "waive" its requirements for those systems able to sustain the burden of proving undue hardship on them individually, cannot justify an agency action exceeding its jurisdiction *ab initio*.

ther, because we are not super-Commissioners, our inexpert view of the wisdom of the regulations under review is not to be substituted for the experience and expertise of the Commission. To shy, however, on those grounds from determination of the legal question touching the Commission's jurisdiction, would be a denial of effective judicial review of regulatory actions "not in accordance with law," 5 U.S.C. § 706 (2)(A) (1970), and an exercise in judicial abdication. The statute having provided no express basis for jurisdiction, we determine the jurisdictional issue in accord with the "reasonably ancillary" standard expressed in *Southwestern*, *supra*, and *Midwest Video*, *supra*.

(2) *The "Reasonably Ancillary" Standard*

Because the Supreme Court sustained its authority to promulgate the rules in *Southwestern* and *Midwest Video*, the Commission says those two cases establish a jurisdiction over cable systems so broad as to authorize the *1976 Report* mandatory access, channel construction, and equipment availability regulations. We disagree.

The jurisdiction found in *Southwestern* was sufficient to encompass prohibition of importation by cable systems of distant broadcast signals into the top 100 markets without a Commission finding of consistency with the public interest. 392 U.S. at 166-67.[27] The Commission's concern was that avail-

[27] The actual Commission order before the Court was in the nature of a "stay," under which no further importation would be permitted until the Commission had had a chance to fully consider the matter. 392 U.S. at 160.

ability of Los Angeles programs in San Diego would fragment the audience of the local conventional television station, risking loss of advertising revenues and curtailment or termination of the local station's service to the public. Petitioner argued that the Commission had no jurisdiction whatever over cable systems. Citing broad purposes in § 1 of Title I, 47 U.S.C. § 151, the Court described the Commission's authority over cable television as restricted to that "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178.

The rule at issue in *Midwest Video*, requiring cable systems to originate programs, was also held "reasonably ancillary" to the Commission's responsibilities for broadcast television. Noting that "§ 2(a) does not in and of itself prescribe any objectives for which the Commission's regulatory power over CATV [cable television] might properly be exercised," 406 U.S. at 661, the plurality found such objectives in the broad policy statements of §§ 1 and 303(g) [28] of

[28] Section 303(g) of the Act provides:

> 303. Powers and duties of Commission.—
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> * * * *
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest * * *. [47 U.S.C. § 303(g) (1970)]

[Footnote continued on page 26]

the Act. The four dissenting justices said the upshot of the plurality's holding was "to make the Commission's authority over activities 'ancillary' to its responsibilities greater than its authority over any broadcast licensee." 406 U.S. at 681. The Chief Justice, concurring in the result, concluded that until Congress acts, the Commission should be allowed wide latitude, but also stated:

> Candor requires acknowledgement, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts. [406 U.S. at 676.]

In our view, the present mandatory access, channel construction, and equipment availability rules burst through the outer limits of the Commission's delegated jurisdiction.[29] The *1976 Report* nowhere states, and the Commission nowhere argues, that these rules were created and applied to cable sys-

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[28] [Continued]

The plurality opinion did not mention the distinction between "radio," which transmits in the electronic broadcast frequency spectrum, and cable systems, which do not.

[29] We are not alone in the view that the Commission's jurisdiction found in *Midwest Video* must represent the "outer limits." The D.C. Circuit, speaking of *Midwest Video* and *Southwestern*, has said, "That these cases establish an outer boundary to the Commission's authority we have no doubt * * *." *Home Box Office, Inc.* v. *FCC*, No. 75-1280 *et al.*, slip opinion at 34, (D.C. Cir. Mar. 25, 1977), *cert. denied*, No. 76-1724 *et al.* (Oct. 3, 1977).

tems to protect a broadcast station's "contour" as in *Southwestern;* or to require, as in *Midwest*, the origination of programs, like broadcasters do; or to govern an activity involving the airwaves; or to protect the growth of broadcast television; or to protect the public interest in continued broadcast television services;[30] or to protect broadcasting against "unfair competition" from cable, or to allow the Commission "to perform with appropriate effectiveness"[31] its responsibilities for broadcast television.

The standard established by the Court is "reasonably ancillary," not merely "ancillary." The standard is already broad, and the term "reasonably," requiring some nexus with the Commission's statutory responsibility, must not be read out of it. Nor can there be deleted what the Court said cable actions must be "reasonably ancillary" *to*, *i.e.*, "the effective performance of the Commission's various *responsi-*

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[30] The *1976 Report*, 59 F.C.C.2d at 326, itself divorces the present access rules from cable regulations based on the public interest in commercial television:

> In the former case [channel capacity and access rules] we seek to promote the expansion of communications services as well as the expansion of the public's access thereto, while in the latter [limitations on broadest programs retransmittable to cable consumers] we seek to insure that the interest of the public in maintaining a healthy commercial television structure will not be undermined. Although there is some relationship between the two considerations, each must be considered on its merits.

[31] *Midwest Video, supra*, 406 U.S. at 661.

bilities for the regulation of television broadcasting." 392 U.S. at 178 (emphasis added).

The Commission has not shown the slightest nexus between its *1976 Report* access rules and its responsibilities for broadcast television.

Because the free public access concept, on newly constructed, separately designated channels, has nothing to do with retransmission of broadcast signals on existing channels, the relationship or interaction between cable and broadcast systems present in *Southwestern* and in *Midwest Video* is totally absent here. The present rules are not designed to govern some deleterious interrelationship of cable systems to broadcasting, or to require that cable systems do what broadcasters do, but relate to cable systems alone, and are designed to force them into activities not engaged in or sought; activities having no bearing, adverse or otherwise, on the health and welfare of broadcasting.[32]

Though neither *Southwestern* nor *Midwest Video* supports jurisdiction here, it is a "reasonably ancillary" standard we apply, and it is the *1976 Report* rules we review. Each regulation of cable television must individually stand or fall, not on legal precedent

[32] At the time of *Midwest Video*, cable operators made "no contribution" for the broadcast signals they retransmitted, and the Chief Justice referred to cable systems' "on stream"-with-broadcasting activities as incurring some burden. Though broadcasters might have been earning more from advertisers through cable's increase in their audience, cable operators are now required to pay a royalty on retransmission. *See* 17 U.S.C. § 111 (1976).

concerning other regulations, but on whether or not the regulation under the review meets the standard established by the Court.[33] The Commission reliance on *Southwestern* and *Midwest Video* ignores the indications in those cases that it has no sweeping jurisdiction over cable television, that whatever jurisdiction it may have is contingent upon its delegated powers, and that each attempt to regulate cable systems must be individually justified. *Nat'l Ass'n of Reg. Util. Comm'rs* v. *FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976).

Thus the Commission argues that the Court's approval of the mandatory origination rule in *Midwest Video* constituted effective approval of the present construction and access rules. The contention is disingenuous. The Court was aware that one way of satisfying the origination requirement was to cablecast programs "produced by others."[34] But that

[33] The Commission appears to have no need for the Court's "reasonably ancillary" standard. In the *1976 Report*, 59 F.C.C. 2d at 299, the Commission reaffirmed its view that cable television "is a hybrid that requires identification and regulation as a separate force in communications." The difficulty with that self-serving view is manifold: it lacks statutory basis; it is open ended, authorizing almost any regulation; and its "separate force" concept ignores the "reasonably ancillary" standard. A private industry does not "require" federal regulation just because a federal agency says it does.

[34] In discussing the definition of cablecasting the plurality stated:

> "Cablecasting" was defined as "programing distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broad-

form of "access" was not the *mandatory* access required by the present rules. Nor did that form of "access" involve the extensive and expensive construction, and equipment purchase and installation, required by the present rules. Further, the plurality opinion *specifically stated* that no regulation, proposed or adopted, other than the program origination requirement, was before the Court, and that no views were intimated on the validity of any other regulations. 406 U.S. at 652 n.4.

The Commission's argument equating its origination rule and the present access rules disregards fundamental differences between them. Under the former, had it been enforced, cable operators would have had discretion and responsibility for program content, could have sought financial support, and would have been forced to act like broadcasters. Under the latter, cable operators can have no discre-

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> cast signals carried on the system." * * * As this definition makes clear, cablecasting may include not only programs produced by the CATV operator, but "films and tapes produced by others, and CATV network programing." * * * Although the definition now refers to programing "subject to the exclusive control of the cable operator," this is apparently not meant to effect a change in substance or to preclude the operator from cablecasting programs produced by others [406 U.S. at 653 n.6.]

The plurality opinion also indicates an awareness that, prior to its *Midwest Video* decision, mandatory public access requirements had been introduced in the 1972 *Cable Report*, but the only regulations before the Court in *Midwest Video* were those promulgated in the *First Report and Order*, 20 F.C.C.2d 201 (1969). *See* 406 U.S. at 654 n.8.

tion or responsibility for program content, may make essentially no charge, and are forced to act like common-carriers.[35]

Nothing, therefore, in the plurality's approval of the erstwhile origination rule as "reasonably ancillary" in *Midwest Video* may serve to bring the entirely distinct mandatory access rules within that standard.

To be "reasonably ancillary," the Commission's rules must be reasonably ancillary to something. As discussed below, the Commission has no jurisdiction within its statutory grant, under the broadest view of that grant, to force the present free public access rules upon broadcasters, or to make broadcasters into common carriers. Because, as we shall see, the *1976 Report* regulations are an attempt to do just that to cable systems, they can fare no better. The Commission having no power to impose these access rules on either broadcast or cable systems, the *1976 Report* regulations cannot be "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."

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[35] A further difference is that under the origination rule programs would have at least been produced, though program quality and viewer interest were not assured. The present rules merely insure that cable owners will spend money to construct studios and channels and install equipment, passing some or all of the cost to their consumer-subscribers.

(3) *Objectives*

(a) *Statutory* v. *Commission Objectives*

The Commission's fundamental argument, in support of jurisdiction to issue its *1976 Report* regulations, is based on "objectives."[36] That view permeates the *1976 Report* and the Commission's brief here, the latter stating the issues as (1) whether the rules are a "reasonable exercise of agency authority to promote statutory objectives," in the face of arguments "rejected" in *Midwest Video*, and (2) whether the constitutional arguments, "also similar to those rejected in *Midwest Video*," are without merit. Even if a statutory statement of objectives constituted a grant of power, the objectives on which the Commission relies are not those stated in the statute.[37]

The statutory objectives stated in § 1 of the Act (not cited as authority in the *1976 Report*) are "to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide and world-wide wire and radio communication serv-

[36] The Commission's argument built on *Midwest Video* concentrates on what is claimed to be the Court's "approval" of the Commission's "objectives" in that case.

[37] The entire tone of the Commission's *Notice of Proposed Rulemaking in Docket No. 20508*, 53 F.C.C.2d 782, and its *1976 Report*, indicates a devotion to the goal, *per se*, of public access to cable television. "Accordingly, we specifically reaffirm the *commitment* which we made to the public, educational, governmental and leased *access concepts* contained in the *Report and Order* [*Cable Report*]," 53 F.C.C.2d at 790, and "reaffirm our commitment to access * * * [and] to pursue our *access goals* * * *," 53 F.C.C.2d at 795 (emphasis added).

ice * * *." The Commission does not argue that this, or any one of the statutory sections cited as authority in the *1976 Report*, *see* note 25 *supra*, contains objectives achieved or approached by the present regulations. And well it doesn't. For the Act, however broadly read, contains no objectives so broad as to encompass whatever is necessary to get everybody on television. If that major foray be a legitimate goal, it must be established not by the Commission or the courts, but by Congress.

The "objectives," cited and relied on by the Commission in its brief here, are of its own design: "increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services."

The Commission draft of objectives in its brief is not the statement submitted to the Supreme Court in *Midwest Video*, where the full statement read, "*to further long established regulatory goals in the field of television broadcasting* by increasing the number of outlets of community self-expression and augmenting the public's choice of programs and types of services." 406 U.S. at 667-68 (emphasis added). The Commission's brief thus tailors a set of objectives to fit the rules it desires here to sustain. To condone that practice would be to turn judicial review of the regulatory process on its head.[38]

[38] The Commission says its objectives were "recognized" in *Midwest Video*. The plurality there did say that the Commission had reasonably determined that the origination rule would further achievement of the objectives cited to the Court, 406

If any specific "long established goals in the field of television broadcasting" are here involved, we are not told what they are. In the statement used to persuade the plurality in *Midwest Video*, "increasing outlets" and "augmenting choices" follow "by," and are thus set forth as *actions* leading to the broadcasting goals. We are cited to no instance in which "increasing outlets" and "augmenting choices" have *themselves* been approved as cable jurisdiction-spawning goals.[39] If "increasing outlets" and "augmenting choices" are goals, they cannot be divorced from the context of broadcasting. That context de-

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U.S. at 667-68, but the relationship of even those objectives to mandatory access rules was not before or discussed by the Court. It was also indicated generally in *Midwest Video* that the Commission was not limited to preventing cable's adverse impact on broadcasting, but could regulate cable systems toward achievement of *statutory* objectives, and that the Commission's objectives were within its "mandate for the regulation of *television broadcasting*." 406 U.S. at 668 (emphasis added). Though the Court in *Midwest Video* stated that § 2 of the Act, 47 U.S.C. § 152, contained no objectives "for which the Commission's regulatory power over CATV might properly be exercised," 406 U.S. at 661, the Commission cited § 2 as among the statutory sections authorizing the present access rules.

[39] As discussed at p. 45 *infra*, whatever the "long-established goals" are, their achievement cannot lawfully be attempted "in the field of television broadcasting" by means of the access rules here at issue. That fact weighs heavily against the claim of jurisdiction to issue these rules as "reasonably ancillary" to the Commission's "responsibilities for broadcast television." Moreover the notion that a federal agency may lawfully compel a private industry, in *any* field, to build facilities, to dedicate them to free public use, and to police that use against obscenity, appears at best unique.

fines and limits the means by which those goals may be sought. Moreover, if the objectives cited in *Midwest Video* and those cited here had been stated identically, that circumstance would not sustain the present rules. The only possible objectives—rules relationship in *Midwest Video* applied to origination. Because the rules are fundamentally different, relationship to an origination rule provides no support for rules enabling anyone and everyone to "get on" cable television.[40]

Doubtless "increasing outlets" and "augmenting choices" are laudable, praiseworthy, and desirable actions. Communication is the life blood of a free society, and "freedom of communication" is virtually synonymous with "freedom of speech" and "freedom of the press." It can be assumed that no agency will act toward objectives perceived as evil, but the world has come to regret many actions taken in the name of attractive euphemisms and appeals to goals beloved by many.

"[T]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). Though those cases did not deal with access-by-all, the quoted principle is unchallengeable. To enliven and enrich the public dialogue is a commendable

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[40] "In the future everybody will be world famous for fifteen minutes." *Andy Warhol*, Boston Book and Art, 3d ed., p. 12 (1970).

intent. We are here concerned, however, not with the Commission's psyche, but with its action. The question before us is not the sincerity of the Commission or the glorious nature of its objectives. The sole question is whether compelling cable systems to build and dedicate facilities to essentially free public use was within the Commission's jurisdiction.

The Commission calls "increasing outlets" and "augmenting choices" its "regulatory policy," pointing not to the Act but to the only former action appearing to support that policy, *i.e.*, *Midwest Video*, which dealt with entirely different regulations. Whether we find the "policy" attractive is irrelevant. A court may favor an agency-esponsed policy, while condemning the agency's exercise of unauthorized power in a specific action taken in pursuit of that policy. The nobility of a goal or policy cannot justify usurpation, by the Commission or by us, of a power to pursue it in whatever manner we think might "work."

The fundamental principle that governmental agencies are limited to the exercise of power delegated by the Congress would be nullified if an agency (like Disraeli, who is said to have preferred the power to write the public's slogans over the power to write its laws) were at liberty to expand its jurisdiction, as far and wide as it wished, by the facile, case-by-case step of re-writing the objectives found in the delegating statute. If "jurisdiction" be synonymous with agency-drafted, *ad hoc* "objectives,"

Congress and the courts become essentially superfluous.[41]

In its *1976 Report* and before us, however, the Commission overrides all concerns, practical, statutory, legal, and constitutional, upon a single analysis, *i.e.*, it is enough that its objectives be good and that its action be reasonably related to them. But the list of good "objectives" conceivable by the numerous regulatory agencies of the federal government, and perhaps achieveable if they had *carte blanche*, is endless. And every act of every agency would be justified, jurisdictionally sound, and judicially approved, if values sought were the sole criterion.[42]

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[41] Congress would still be needed to create and fund agencies, and courts might still be needed to rubber-stamp every action likely to achieve the broad "objectives" improvised by the agency.

[42] The illogic of considering agency objectives as *sole* justification for agency action is illustrated here. The goal of "increasing the number of outlets for local self-expression" can be facilitated by requiring not just cable systems, but theatres, newspapers, broadcast stations, museums, concert halls, universities, and all who have acquired an audience, to grant free public access to their facilities and to a possible "shot" at their audiences.

ACLU points to *Nat'l Citizens Comm. for Broadcasting* v. *FCC*, No. 75-1064 (D.C. Cir. March 1, 1977) in support of a presumption in favor of diversity of expression. In that case, however, the court dealt only with *broadcasters*, holding that the Commission could not refuse to order divestiture of cross-owned radio and television stations, because divestiture increases the likelihood that the public will hear broadcasters with diverse views, and because lack of access by a broadcaster to the airwaves impinged on First Amendment policies.

The Commission has on other occasions faced the delicate task of softening our troubled edges, when there occurs a restriction of someone's right to speak. Government may have to act to prevent single ownership of all television, radio, and newspaper voices in a community. The Commission's mandatory access, channel capacity, and equipment rules are quite another matter. Here the Commission engages in no protection of the right to speak. On the contrary, it has embarked, with positive commands, on a crusade to *create* a public right to use cable facilities.

True, the Commission acted here with a view toward expanding what it considers the goals of the First Amendment.[43] Every regulatory agency should have all constitutional "goals" and restrictions on government in mind in carrying out its duties (the more so where, as here, the agency is operating out-

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There is no conflict with that case in our holding that the Commission lacks jurisdiction to impose access by the public to private cable facilities. That increased opportunities for diverse expression remain high among our society's desiderata does not confer jurisdiction to do what the Commission did here.

[43] Dean Griswold's "decisional leapfrogging," though applied to the Constitution and the courts, may be applied to agencies, which may also decide that, "Well, it really is a good idea." (Here the obviously good idea of increasing opportunities to exercise freedom of speech) *See* Griswold, *The Judicial Process*, 28 Rec. of N.Y.C.B.A. 14, 25 (1973). The present rules are not designed to meet a constitutionally forbidden "abridging" of the right to speak. Nor do they involve the "balanced presentation of ideas" concept of the Fairness Doctrine. They merely attempt to create a public right to speak on cable television.

side its stautory jurisdiction) but we deal here with the Federal Communications Commission not the Federal First Amendment Commission. We are aware of nothing in the Act and have been cited to no other proper source, which places with the Commission an affirmative duty or power to advance First Amendment goals by its own *tour de force*, through getting everyone on cable television or otherwise. Rhetoric in praise of objectives cannot confer jurisdiction. If the Commission desires to operate in an area beyond its statutory borderline of jurisdiction, and to direct an industry, at that industry's expense, to provide and police new opportunities to speak, prior Congressional direction appears a minimum requirement.[44] Composing its own statement of "objectives" will not alone provide the required jurisdictional power.[45]

(b) Objectives and Retransmission

The Commission's brief justifies its zeal for free public access to cable television, as it has most of its

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[44] We do not here consider, of course, whether the Congress could constitutionally so direct.

[45] The Commission's submission of an objectives statement in support of origination, and its submission of *part* of that statement here in support of free public access, is a further illustration of the unreliability of broad, malleable, agency-created, all purpose "objectives" as the sole basis for testing jurisdiction. There is no question that public access necessarily increases outlets and augments choices. The present agency rationale for requiring cable systems to build additional channels, for example, would support the jurisdiction to order a cable system built where none existed, for that would "increase outlets" and "augment choices."

cable regulations, on cable's reception and retransmission of broadcast signals, *i.e.*, its "free ride" on broadcast television, for which cable should "pay" by meeting Commission "objectives." In its *Cable Report*, 36 F.C.C.2d at 190, and in its present brief, the Commission states:

> Broadcast signals are being used as a basic component in the establishment of cable systems, and it is therefore appropriate that the fundamental goals of a national communications structure be furthered by cable * * *.[46]

To the extent that cable systems must now pay royalties for broadcast programs retransmitted, note 32 *supra*, the Commission's "free ride" rationale may crumble. Beyond that question, however, the Commission does not "own" broadcast programs, and may not lawfully condition their retransmission on compliance with any and every rule it may devise.

In *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), a copyright case concerned with whether cable systems "performed" retransmitted broadcast programs, the Court discussed cable's retransmission activity:

> Essentially, a CATV [cable television] system no more than enhances the viewer's capacity to

[46] The Commission went on to state that cable could not have the economic benefits of signal carriage without having public responsibilities as well. *Cable Report*, 36 F.C.C.2d at 354. The National Black Media Coalition, et al., also emphasizes cable's "free" acquisition of broadcast signals which no longer obtains. *See* note 32, *supra*.

> receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. * * *.
>
> The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. [392 U.S. at 399-400 (footnotes omitted).][47]

In *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966), then Judge, now Chief Justice Burger said, "[N]either is [a broadcaster] a purely private enterprise like a newspaper or an automobile agency. * * * A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." 359 F.2d at 1003. A cable system is on this record a private enterprise. No statute requires or authorizes federal franchising of cable systems. In retransmitting broadcast programs, cable systems use no "limited and valuable part," or any other part, of the federal public domain. The Commission nowhere tells us, nor is it

[47] In *Fortnightly*, the Court held that cable systems did not "perform" programs retransmitted and did not, therefore, have to pay royalties. 392 U.S. at 400-01.

readily apparent, *why* the mere retransmission of broadcast signals makes it "appropriate" that cable be shackled to every Commission notion of what is good for the public—or why the mere transmission of broadcast signals makes it "appropriate" that cable be chained (by requiring it and it alone to build, dedicate, and police new and separate facilities for public use) to the Commission's vision of the future.

The Commission does not say that the absence of 20 cable channels, and free public access thereto, has in any manner impeded "the fundamental goals of a national communications structure." What the Commission does say is that the cable industry must be regulated to give public access because cable is *there*, and has a "potential" to build a many-channeled capacity. *A fortiori*, says the Commission, cable systems must build and dedicate that capacity, to achieve the Commission's "objectives." But nothing whatever in the Act, or anywhere else, gives the Commission the unlimited right to say to any private industry, "We believe we have seen the future, and you must construct it." Because an industry *can* do something cannot be the sole basis for a federal agency's peace-time jurisdiction to make it do it.

(c) Objectives v. *Unsupported Visions*

The regulatory philosophy repeatedly expressed in the *1976 Report* is that the imponderable whims of cable consumers cannot be relied upon, but that fa-

cilities, if built and offered free, will encourage their own use: [48]

> Should compliance with our requirements result in the maintenance of blank or partially blank channels, it is our belief that the time required to realize the full potential for access services will be shortened, for these channels are themselves a visible and continuing inducement to be filled. [*Notice of Proposed Rulemaking*, *supra*, 53 F.C.C.2d at 787-88.]

Building for the future, says the Commission, will enable it to take advantage of cable's "capability," relying thus on a type of trickle-out theory to facilitate its social-engineering effort. The rules under review are thus self-fulfilling: they first compel the creation of excess capacity, and then impose a public access obligation on the ground that the capacity exists.[49] The Commission must have broad discretion

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[48] The *1976 Report* resulted from the realization that many equipment and construction requirements of the 1972 *Cable Report* had proven excessively burdensome, counterproductive, and unrealistic. A major value in a competitive, consumer-choice system lies in the limitation of losses to those entrepreneurs who, like the purveyor of the Edsel, guess wrong about consumer preferences. A major detriment resides in regulatory action requiring massive construction by an entire industry to meet an agency-envisaged future, and with no evidence of consumer demand. If the guess is wrong, everybody loses.

[49] Some, but only some, cable systems have already built 20 or more channels, some in response to the *Cable Report*. That circumstance does not create a jurisdiction in the Commission to compel public access to the facilities of any cable system.

"to respond to changes which necessarily emanate from a dynamic industry," *General Telephone Co. of Cal.* v. *FCC*, *supra*, 413 F.2d at 405, but the present access rules are not a response to change; they are the creation of change, in the "belief" that what the Commission describes as a "societal good," *1976 Report*, 59 F.C.C.2d at 296, will result.

Visions of theoreticians are in proper context of great value. To achieve, man must visualize. And regulatory agencies must take into account both the future and the future effects of their regulations, as best those effects may be estimated on a proper record. But visions of the future, with their low batting average for accuracy, serve poorly as the *sole* basis for regulations having the force of law; [50] and prophecies of even the wisest regulator are no substitute for a lawful grant of jurisdiction.

Regulations like those before us, profoundly altering the obligations of a private business, requiring a fundamental change in its nature, and imposing costs on its consumer-subscribers, should be based on more than an uncertain trumpet of expectation alone. In enforcing regulations designed by the regulator to make futuristic visions come true, courts must proceed with a care proportional to the risk of delivering

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[50] As discussed *infra*, the Commmission rescinded its mandatory origination rule because, *inter alia*, there was no demand for such programs. In its *1976 Report*, the Commission refused to consider whether any viewer demand existed for access programs, though the "access concept" and its *Cable Report* had been extant for years. *See* p. 12 *supra*.

thereby into the regulator's hands an awesome power. For that way may lie not just a totally regulated future, unpalatable as that may be to a free people, but a government-designed, government-molded, government-packaged future.

The public interest rubric encourages judicial deference to an agency's expertise, not to its prescience. Findings may be presumptively correct. Not so futuristic guesses.

Most importantly, jurisdiction is not acquired through visions of Valhalla. An agency can neither create nor lawfully expand its jurisdiction by merely deciding what it thinks the future should be like, finding a private industry that can be restructured to make that future at least possible, and then forcing that restructuring, in the mere hope that if it's there it will be used.

The Commission asserts that it has a mandate to meet the always-with-us "need for additional means of community expression," *Notice*, *supra*, 53 F.C.C. 2d at 790. We need not determine whether the Commission has such mandate. It is enough to hold that, if it does, it cannot pursue it by forcing broadcasters, cable systems, ham radio operators, pay-TV systems, subscription-TV systems, closed-circuit-to theatres systems, data processors, or any other communications industry, to construct facilities and donate them to anyone who walks in.

In short, the Commission has not been charged, even impliedly, with a responsibility of "increasing outlets for local expression and augmenting program

choices," by mandating massive rebuilding and by attempting to deliver the audience of *A* over to *B*, at *A*'s expense, just and solely because *B* wants to get an audience,[51] and in total disregard of what the paying audience wants. Whether lodgement of that responsibility in the Commission be good or bad is not for us to say. It has not occurred.

(d) Objectives and the Public Interest

Jurisdiction having been found wanting, we discuss the public interest parameters in response to the Commission's insistence that its public interest objectives authorize its access rules. We do not decide a public interest question, other than to hold that the public interest is not served by agency actions beyond their jurisdiction. *See National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224 (1943).

The Commission founded its access rules on its belief that the "public interest can be significantly advanced by opening of cable channels for use by the public and other specified users who would otherwise not likely have access to television audiences," *1976 Report*, 59 F.C.C.2d at 296, and refused to be deterred by evidence indicating little likelihood of anyone ever watching access programs. The cable consumer was thus made hostage to the Commission's

[51] A responsibility clearly distinguishable from that of guarding a local broadcaster's audience against cable invasion from afar, as in *Southwestern, supra*.

faith that the equipment he was forced to buy would be used.[52]

The Commission referred to a "need" for access services, but refused to undertake a search for evidence of that need, recommended by two Commissioners. *Notice, supra*, 53 F.C.C.2d at 799-801. Absent evidence that the public is or may be interested in listening, the mere belief that the public interest lies in forcing cable operators to build and deliver to each citizen an electronic soapbox would appear entirely conclusory. As did the public interest in mandating origination, p. 73 *infra*, it may also prove illusory.[53]

In insisting that channels be built, so their blankness will be "an inducement to be filled," the Commission made no reference to the consumer, but stated, "This consideration is true both for the potential channel user as well as the cable operator * * *." 53 F.C.C.2d at 788. But, as with the tango, communication takes two. Speaker minus listener equals zero.

[52] The Act, § 1, includes as a *statutory* objective, the provision of an "efficient" communication service. The Commission does not explain, in its *1976 Report* or in its brief here, how the construction of channels and installation of equipment that may never be used, so far as this record and the Commission's experience with mandatory origination would indicate, contributes to *efficiency* of cable systems or serves the public interest in achievement of this statutory objective.

[53] Intervenors National Black Media Coalition et al. suggest, in their brief at 46, a rule that cable owners be required to promote access, by seeking access users and advertising access programs to their subscribers, because it is otherwise "*impossible* to build an audience for access programs." (emphasis added).

The *1976 Report* is concerned with access by the public, not with access to the public.

Absent evidence that there is, or is likely to be, a substantial national demand by "users who would otherwise not likely have access to television audiences," and whether there is, or is likely to be, any demand at all for viewing by consumers, who would have to pay for access equipment (even if no access programs are produced; or no viewers ever watch), the Commission's argument that its objectives require a public interest conclusion that cable systems must be rebuilt, and mandatory access provided, is seriously undermined.[54]

It would appear that satisfaction of the Commission's desire to advance First Amendment interests in increased communication via its access concept can actually be assured only (1) by an Orwellian requirement that users *must produce* and cable consumers *must watch* access programs,[55] or (2) by a cable sys-

[54] Evidence of strong viewer demand would not alone confer upon the Commission a jurisdiction sufficient to authorize its *1976 Report* mandatory access rules; nor, if jurisdiction were present, would such evidence warrant anything less than the most careful evaluation of First Amendment values involved in the "access concept." Evidence of user demand, *i.e.*, of demand for the free use of another's property, while perhaps less difficult to find or generate, would appear to provide even less warrant for either a finding of jurisdiction or dismissal of the First Amendment concerns expressed at p. 58 *infra*.

[55] Illustrating the problems and dangers inherent in some regulatory attempts to achieve positive goals, as distinguished from prevention of improper, injurious, or criminal conduct.

[Footnote continued on page 49]

tem's provision of access programs in response to its subscribers' desire to view them. If, in broadcasting where viewing is free, "the interest of the viewer is paramount," *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1972) (*CBS*); *Red Lion Broadcasting*, *supra*, it would appear more so in cable systems, where subscribers must pay.

A public interest question may be stated as: Who decides whether cable consumers shall pay millions for equipment to enable access programs? The Commission, or the consumer? Nothing of record reflects a public interest in denying consumers that choice, or in forcing consumers to buy what they may refuse to purchase voluntarily. Certainly a merely conjectural connection between mandatory access and likelihood of its increasing true local communication, even if jurisdictionally permissible, would caution us, were we deciding where the public interest lay, against

[55] [Continued]

One intervenors' brief views public access as an opportunity for a minority spokesman to address members of his minority grouping. *Contra*, are those who find that use undesirable, as a potential splintering of society. Lapierre, *supra* note 5, at 120 n.536.

Competitive forces in radio broadcasting, with limited frequencies but *without* mandatory access rules, have not encouraged sameness, but have produced "specialty" stations: all news, black, classical, country, rock and underground. *See* Note, *Filthy Words, The FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 Va. L. Rev. 579, 617 (1975).

concluding that the public interest would be harmed if the choice remained with the consumer.[56]

Given the general desirability of the Commission's objectives, we find no basis, in the record made, for concluding that those objectives render the access rules before us "reasonably ancillary" to the Commission's responsibilities for regulation of broadcast television, or that those objectives confer upon the Commission a jurisdiction broad enough to encompass the present access rules.

(4) Ends v. *Means*

To countenance regulation without at least implied authorization of the people's representatives, because the purpose be benign, is to adopt the view that "the end justifies the means" and stop there. But in government as in life, a good end does not justify any

[56] Cable subscribers represent only a small portion of the television viewers of America, and the *1976 Report* exempts from its impact the cable systems serving some of them. The relationship of the public interest in "increasing community outlets" and "augmenting program choices and services" to free public access on cable facilities would be more apparent if the Commission "objectives" were also sought among the vast majority of television viewers to whom programs are supplied within the Commission's broadcasting jurisdiction, and if the *1976 Report* regulations had not required that cable systems hold open a channel for access, even if no one desires access, and precluded the cable owner from using that channel to increase program diversity with his own or pay-cable programming. *1976 Report*, 59 F.C.C.2d at 316-17. The net result of most attempts to regulate cable systems appears to have been to *restrict*, not augment, the number and type of programs available to cable consumers.

and every means. As above indicated, origination and madatory access are very different means indeed, and, as discussed below, the Commission is statutorily prohibited from enforcing its present mandatory access rules within its statutory jurisdiction over broadcasters.

It is not jurisdictionally so that means are immaterial, so long as broadly encompassing "objectives" can be restated from the purpose statement in § 1, or from the powers and duties statement in § 303(g), of the Act. Referring to *Southwestern* and *Midwest Video*, the D.C. Circuit has stated:

> That these cases establish an outer boundary to the Commission's authority we have no doubt . . . and if judicial review is to be effective in keeping the Commission within that boundary, we think the Commission must either demonstrate specific support for its actions in the language of the Communications Act or at least be able to ground them in a well-understood and consistently held policy developed in the Commission's regulation of broadcast television. [*Home Box Office, Inc.* v. *FCC*, *supra* note 29, at 34.]

A "well-understood and consistently held policy developed in the Commission's regulation of broadcast television" includes regulatory means as well as regulatory goals. In *Home Box Office*, after noting that the Commission was without authority to control the program content of broadcast television in the manner sought under the anti-siphoning rules there at issue, the court said:

> Moreover, given the similarities between cablecasting operations and broadcasting, we seriously doubt that the Communications Act could be construed to give the Commission "regulatory tools" over cable-casting that it did not have over broadcasting. * * * Thus, even if the siphoning rules might in some sense increase the public good, this consideration alone cannot justify the Commission's regulations. [*Home Box Office, Inc.* v. *FCC*, *supra* note 29, at 41-42.][57]

In *Home Box Office*, the Commission was employing means not available in broadcast regulation to control cablecasting activities already underway. Its present effort to employ means not available in broadcast regulation is even further beyond its jurisdiction, for here the Commission is attempting to compel the initiation of particular (access) cablecasting activities. It is at best anomalous to assert that broadcasting objectives are furthered by use of regulatory tools not lawfully useable to regulate broadcasting.[58]

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[57] *Home Box Office* may be interpreted as denying the Commission "regulatory tools" over cable it does not have over broadcasting, as equating government power over cable systems with that over newspapers in the context of intrusion into First Amendment rights, or as confining the Commission to regulation of cable activities having a nexus with cable's carriage of broadcast signals. Each interpretation would apply here, and each necessitates the setting aside of the *1976 Report* access rules.

[58] In a post-hearing submission, the Commission cites *Nat'l Citizens Comm. for Broadcasting* v. *FCC*, No. 74-1700 *et al.* (D.C. Cir. Nov. 11, 1977) and the indication therein that the Commission should consider whether broadcasters could satisfy their *fairness* doctrine obligations by *voluntarily* providing public access. We are at a loss to understand what bearing the cited case has on the present proceeding, which does not involve the fairness doctrine, but which does involve *compelled* access and an effort to impose common carrier type obligations, or to understand how, if at all, the case can be thought to have overturned the Commission's policy respecting forced access to broadcast facilities reflected in *Columbia Broadcasting System, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94 (1973) or to have repealed the statutory prohibition against treating broadcasters as common carriers, p. 53 *infra*.

As we have said, regulatory action cannot be "reasonably ancillary" to nothing.

We need not determine what distinctions the Commission may draw between broadcasting and cable systems. It is sufficient to hold that, in making any such distinction, the Commission may not exceed its jurisdiction. However attractively the Commission's objectives are interpreted, reinterpreted, or re-packaged, regulatory actions forbidden as means to achieve them within its statutory jurisdiction cannot be considered "reasonably ancillary" to that jurisdiction.[59]

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[59] To the extent, if any, that "increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services" are legitimate goals achieveable in broadcasting, they would appear automatically achievable with respect to those broadcast programs retransmitted by cable. The retransmitted broadcast programs have already had the benefit of Commission regulation. Where cable provides the only television service, and monopolization is a legitimate concern, a requirement that public information programs of broadcast television be retransmitted would appear to be an application of the same regulatory tool used to achieve the same public interest goals achieved within the Commission's jurisdiction over broadcasters.

(5) The Means Are Forbidden Within The Commission's Statutory Jurisdiction

(a) Forced Access

Counsel for the Commission admitted at oral argument that the mandatory access rules here at issue could not be enforced upon broadcasters. Though counsel said the reason lay in scarcity of broadcast frequencies, it appears to have escaped Commission attention that it is the scarcity of broadcast signals that *excuses* its limited regulatory intrusion on First Amendment and other rights of broadcasters. The Commission's notion that the absence of scarcity in the potential number of cables removes the limits on its authority has things backward. The absence of scarcity removes the *excuse* for intrusion.

The reasons why access-to-cable cannot be justified as related to the broadcast milieu are fundamental and pervasive. First, as indicated throughout this opinion, many impedimenta to enforcement of mandatory access have nothing to do with scarcity of broadcast frequencies. Second, the Commission's breadth of regulatory power over "semi-public" broadcasters, though limited, is expressly statutory and greater, not less, than any ancillary power it may have over private media, like cable systems. *See National Broadcasting Co.* v. *United States*, *supra*, at 216-219 (1943). Third, the Commission's confirmed policy is that no private individual or group has a right to use broadcast frequencies, and it has recognized that action contrary to that policy is beyond its jurisdiction.

If there be a relation between public access and the Commission's "long established regulatory goals in the field of television broadcasting," it escapes detection in the Commission's actions within its jurisdiction. The Commission firmly rejected an opportunity to move even partially toward those goals, as it here interprets them, when it was requested to force *paid* and *limited*, not free and fullblown, access on broadcasters. Its resistance was sustained by the Supreme Court, which established that no person has a constitutional right of access to broadcast television. *CBS*, *supra*.[60]

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[60] The Commission correctly says that *CBS* held that it need not force access on broadcasters, not that it could not do so, and that the Court referred to Commission plans to apply access to cable systems. As indicated in *CBS*, 412 U.S. at 113, the Commission and the Congress have consistently recognized the serious statutory and constitutional prohibitions against enforcement of public access upon broadcast facilities. The Court in *CBS* did make a passing reference to proposed access rules for cable systems, but only in the course of discussing the possibility of some form of "limited" access to broadcasting at some future date, *id.* at 131, and *no* Commission rule, access or other, was before the Court. Nor were these access rules before the court in *Home Box Office*, *supra* note 29. The Commission inappropriately argues that footnote 82 in the latter opinion shows that the D.C. Circuit "would approve an access obligation." In all events the non-dicta statements of the Court in *CBS*, and those in *Home Box Office*, are far more persuasive than passing remarks and footnotes relating to matters not before the courts. Concentrating on the latter, the Commission disregards language indicating the impropriety of its access rules, *e.g.*, the non-public interest in access as favoring the wealthy, 412 U.S. at 123; the difficulty of applying the Fairness Doctrine and how its suspension would

Indeed, if there be a "public interest" in achievement of the Commission's "long established goals" through access, the Commission has not attempted to serve that public interest by requiring broadcasters, who reach the vast majority of television viewers and are clearly within its jurisdiction, to give (or even sell), even limited time to the public on a first come, nondiscriminatory basis; nor does the Commission deny broadcasters the right to control the material going out over their facilities.

This court will not interpret the Commission's "long established goals" one way when the Commission is operating near the ancillary fringes of its statutory jurisdiction, and another way when it is operating clearly within its statutory jurisdiction; nor can we believe that the Commission's "long established goals," interpreted by the Commission as authizing public access, are legitimate when applied to cable systems and illegitimate when applied to broadcasters.

Still, at the very time the Commission was telling us that only practicality impeded its full authority to force the present free public access rules upon broadcasters, it refused even to inquire into the need for broadcasters to give even a little time (petitioners sought 90 seconds out of every 7,200 seconds) to Public Service Announcements (PSAs), and to adopt rules enabling citizen groups, minority spokesmen,

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lose more than gained, *id.* at 124; and Congress' conclusion that "the public interest in being informed requires periodic accountability * * *," *id.* at 125.

and in general the same access-seekers involved here, to have their announcements aired. *Petition to Institute a Notice of Inquiry and Proposed Rule Making on the Airing of Public Service Announcements by Broadcast Licensees*, FCC 77-685 (Released Oct. 13, 1977). The petitioners' "objectives" were paraphrases of those relied on here by the Commission, *i.e.*, an increase in "diversification" of "programming," community service, meeting local needs, favoring "those citizen groups whose voices typically have not been heard on the broadcast media," and providing "needed assistance to citizen groups in communicating their programs to the public." Petitioners also asked that broadcasters make facilities and technical assistance available.

Broadcasters argued, in *Petition*, *supra*, that the "proposed rules would be an impermissable intrusion into [their] programming prerogatives," that "requiring a broadcaster to air a particular type of program matter constitutes censorship," that providing technical assistance would be a "heavy burden" on small staffs, and that giving "special access to certain groups" was contrary to "the Commission's policy that no private individual or group has a right to the use of broadcast facilities." In its decision denying an inquiry, the Commission stated:

> After considering these arguments we believe that even if the First Amendment and Section 326 of the Communications Act are not an absolute barrier, adoption of the instant proposal would be an inappropriate intrusion into the sen-

sitive area of programming. For this reason and because of the licensee's knowledge of his community, he is accorded broad discretion in programming matters, including the scheduling and selection of PSAs.

* * * *

* * * As to providing a preference for citizen group announcements, we note that no private individual or group has a right of special access to the airwaves. [*Petition, supra*, at 4, 6] [61]

Again, in a recent proceeding, *Changes in the Entertainment Formats of Broadcast Stations, Notice of Inquiry*, 57 F.C.C.2d 580 (1976), *Memorandum Opinion and Order*, 60 F.C.C.2d 858 (1976), the Commission concluded that it lacked authority to regulate broadcast program formats, because that action is analogous to imposing common carrier responsibilities on broadcasters and is thus prohibited by Section 3 of the Act, 60 F.C.C.2d at 859; and because "[i]t is impossible to determine whether consumers would be better off [with a particular format] without reference to the actual preferences of real people." *Id.* at 864. The Commission's *1976 Report* attempts to impose a "public forum" format on cable systems,

[61] At this point, the Commission added a footnote: "See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), in which the Commission's long-standing policy against such special access was upheld." The Commission did not, as it does here, refer to the Court's passing remark about the possibility of developing a "limited" form of access, though the remark related, as did *CBS* and the *Petition*, to a demand for *limited* access to *broadcasting*.

and, as discussed below, it does impose common carrier responsibilities, and it totally ignores the preferences of cable consumers, who are "real people."

Thus the Commission exceeded its own recognized jurisdictional limitations in the field of television broadcasting, when it attempted to impose its *1976 Report* mandatory access, channel construction and equipment rules on cable systems.[62] The Commission does not in truth rely here on any "reasonably ancillary" jurisdiction. The jurisdictional genesis for the present access rules is not even allegedly lurking in the lacuna of the Act.[63] It arises not from a power over broadcasting but from a Commission act of creation. Creation, however, is a function of the Almighty, and in the creation of jurisdictional authority, the almighty is Congress, not the Commission.

(b) Common Carrier

Section 3(h) of the Act, 47 U.S.C. § 153(h), provides that "a person engaged in radio broadcasting shall not * * * be deemed a common carrier." In

[62] The present rules are an effort by the Commission to exercise the "authority over activities 'ancillary' to its responsibilities greater than its authority over any broadcast licensee" referred to in the *Midwest Video* dissent. 406 U.S. at 681.

[63] The Commission's power to license broadcasters exists only "insofar as there is demand for same * * *," 47 U.S.C. § 307(b) (1970), and the issuances of licenses is the means "to provide a fair, efficient, and equitable distribution of radio service * * *," 47 U.S.C. § 307(b) (1970). Nothing in the *Act* authorizes the Commission to create licensees, or to force anyone to become public access broadcasters, whether to "increase outlets" or for any other reason.

National Association of Regulatory Utility Commissioners v. *FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) *cert. denied*, 425 U.S. 992 (1976), and in *National Association of Regulatory Utility Commissioners* v. *FCC*, 533 F.2d 601, 608-09, (D.C. Cir. 1976), the court defined the two prerequisites of communications common carriage: (1) provision of service to users indiscriminately; and (2) transmission of intelligence of the user's own design and choosing. The *1976 Report* mandatory access rules require: (1) provision of cable service to users indiscriminately; and (2) transmission of intelligence of the user's own design and choosing. Thus the *1976 Report* imposes common carrier responsibilities on cable systems, and the attempt to bludgeon cable systems into becoming common carriers is an exercise specifically forbidden the Commission within its delegated powers. It is no more jurisdictionally sound than the same action would be if exerted against broadcasters.[64]

The *1976 Report* creates a dilemma and impales itself on the horns. The regulations require that a cable system cablecast access users' programs. If the Commission's equation of "cablecast" to "broadcast" be made, the cable system, as broadcaster, cannot

[64] The Commission is statutorily prohibited from censorship. 47 U.S.C. § 326 (1970). The present access rules not only impose common carrier obligations, it imposes prior censorship duties, *see* p. 66 *infra*, on cable operators. There being no public access to broadcasting, such prior censorship duties have never been imposed on broadcasters, which the Commission is empowered to regulate directly.

have the Commission's common carrier type access rules enforced upon it without violation of the Act.[65]

There can be no question that the *1976 Report* mandatory access rules are an attempt to convert cable systems into common carriers with respect to their bandwidths not used to retransmit broadcast signals. In the parent *Cable Report*, the Commission emphasized that it contemplated "a multipurpose cable operation combining carriage of broadcast signals with program origination *and common carrier service*. 36 F.C.C.2d at 197. (emphasis added) It repeated that contemplation in its *Reconsideration*, 36 F.C.C.2d at 352.[66]

[65] If "cablecaster" and "cablecasting" be read as "broadcaster" and "broadcasting," the access rules actually require that a cable operator become a common-carrier type broadcaster, or a broadcasting-type common carrier. In rejecting petitioner's First Amendment arguments, the *1976 Report*, 59 F.C.C.2d at 299, defends the access rules as permissible, "[w]hen broadcasting, or related activity by cable television systems is involved * * *." The Commission did not explain why, if "broadcasting * * * is involved," it did not apply its broadcast rules. Moreover, because cablecasts are sent only through the cable system's cables, and only to the system's paying subscribers, the equation of cablecasting to "broadcasting," *i.e.*, to sending a communication out over radio frequencies for free pick-up by anyone with a receiver, appears at best tenuous.

[66] That Congress has recognized the giving of the microphone to everyone, even if they pay for it, is making the microphone owner a common carrier, is reflected in the quotations from legislative history quoted in *CBS*, *supra*, at 105-110.

ACLU argues that cable systems have in recent times adopted practices which it says are common carrier in nature, citing *Nat'l Ass'n of Reg. Util. Comm'rs* v. *FCC*, 533 F.2d 601

To keep its "Certificate of Compliance," a cable system must comply with the Commission's mandatory access regulations (or seek a waiver, which has no jurisdictional effect). In *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583, 592, 599 (1926), the Court found it an unwarranted intrusion into the conduct of a private enterprise for the government to mandate that trucking companies offer their services as common carriers or not at all, rejecting the argument that the state could so condition the use of highways. We find it an unwarranted intrusion into the conduct of a cable enterprise for the Commission to mandate that cable companies offer services as common carriers or not at all, and we reject the argument that it may so condition broadcast program retransmission, which has not even the nexus to cablecasting that highways may have to trucking. *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394, 405 (1974).

Prior to promulgation of mandatory access rules, cable operators had full discretion to decide what originated programming to distribute over their fa-

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(1976), which dealt with point-to-point, two-way, nonvideo communications, not free public access to cable systems facilities. To the extent that cable systems elect to engage in or interact with common carrier activities, those activities or interactions may be subject to regulation; the problem comes when the Commission attempts to force common carrier activities. ACLU's insistence that the access rules of the 1972 *Cable Report* be resurrected, by essentially full common carrier regulation under Title II, with freedom to set lease rates that will attract capital, illustrates the identity of access rules and coercion of cable systems into common carrier activities.

cilities. That would have remained true if the Commission had enforced its origination rule, under which cable operators need not have transmitted communications of all comers. Access rules, removing discretion from cable operators and forcing them to act as common carriers, do not prevent a business entity from acting in a manner injurious to the public interest. The present rules merely accomplish the coercion into common carrier operations of a business neither acting as, nor holding itself out as, a common carrier.

The Commission chooses not to meet directly Midwest's argument that it lacks jurisdiction to force common carrier responsibilities upon cable systems. It merely relies on the broad allegation that its access rules "are reasonably related to achieving objectives." [67] That reliance must fail, for imposition of common carrier responsibilities to achieve broadcast goals impermissibly intermixes the two fields which Congress expressly kept asunder, by its enactment of § 3(h) of the Act, and its separate treatment of common carriers (Title II) and broadcasters (Title III) in the Act.

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[67] "So long as the rules adopted are reasonably related to achieving objectives for which the Commission has been assigned jurisdiction we do not think they can be held beyond our authority merely by denominating them as somehow 'common carrier' in nature. The proper question * * * is * * * whether the rules adopted promote statutory objectives" *1976 Report*, 59 F.C.C.2d at 299. The Commission does not tell us how or why its access rules are not far more than merely *denominated* as "somehow" common carrier in nature, or why they are not in fact common-carrier-type rules.

Though the Commission tells us that *Midwest Video* legitimized its present common carrier type access regulations, the Commission told the Supreme Court that the origination rule there involved was an attempt to require cable systems "to meet some of the same basic standards of responsibility to the public that are imposed on broadcasters." Brief for appellants United States and FCC at 15 n.12, *Midwest Video, supra.*[68] Because the Commission's *1976 Report* regulations are an attempt to require cable systems to meet "standards of responsibility to the public" that *cannot* lawfully be "imposed on broadcasters;" they are necessarily divorced from, rather than reasonably ancillary to, the Commission's regulation of broadcasting.

II Constitutional Considerations

The *1976 Report* access regulations having exceeded the Commission's jurisdiction, it is unnecessary to rest our decision on constitutional grounds and we decline to do so. *Benanti* v. *United States*, 355 U.S. 96, 99 (1957); *Neese* v. *Southern Railway*, 350 U.S. 77, 78 (1955); *Peters* v. *Hobby*, 349 U.S. 331, 338 (1954). Moreover, communications technology is dynamic, capable tomorrow of making today obsolete. Referring to First Amendment rights of broadcasters and the public, in *CBS, supra*, the Court said, "At

[68] There was no common carrier question raised in *Midwest Video*. The origination rule had at least the merit of compelling cable operators to do no more than what broadcasters must do, *i.e.*, originate programs.

the very least, courts should not freeze this necessarily dynamic process into a constitutional holding." 412 U.S. at 132.

Though we find it unnecessary to resolve the serious constitutional issues raised, we do hold that where, as here, potential incursions into sensitive constitutional rights are involved, careful scrutiny is required in delineating the scope of authority that Congress intended the agency to exercise.

> Even the broadest opinion, that of the plurality in *Midwest Video Corp.*, recognizes that the Commission can act only for ends for which it could also regulate broadcast television. Indeed, even this standard will be too commodious in certain cases, since * * * the scope of the Commission's constitutionally permitted authority over broadcast television in areas impinging on the First Amendment is broader than its authority over cable television. [*Home Box Office, Inc.* v. *FCC*, note 29 *supra*, at 33-34.]

Moreover, the First Amendment overtones, and other constitutional considerations present in the *1976 Report*, are such as to reinforce our conclusion on the jurisdictional issue.[69]

[69] That the origination rule in *Midwest Video* was free of the potential First Amendment problems created by mandatory access rules serves to further strengthen our conclusion that the "reasonably ancillary" standard, though it legitimized origination, cannot encompass mandatory access.

If jurisdiction existed, necessitating resolution of the constitutional issues, we would not interpret the Commission's

(a) The First Amendment

This is the first case raising the First Amendment implications of a Commission effort to enforce unlimited public access requirements. The Commission has shown a proper care and concern for the First Amendment rights of broadcasters, and for the Act's (§ 326) prohibition of censorship, as illustrated by its resistance to demands for limited access to broadcast television. *CBS*, *supra; Petition*, FCC 77-685, *supra*. That care and concern is remarkably absent from the *1976 Report*, compelling unlimited access to cable television.

Nor does the Commission make any effort before us to indicate that, in its *1976 Report*, it engaged in the required, though difficult, "balancing" task in which it has traditionally engaged with respect to First Amendment values in exercising its jurisdictional responsibilites for broadcast television. Concentrating on creating a public right to exercise freedom of speech on cable television, the Commission gave no thought, on this record, to freedom of the press.

The Commission points to *no* First Amendment right which it believes overrides the First Amendment rights it has recognized in broadcasters but refused to recognize in cable operators. Instead, the Commission's brief dismisses Midwest's concern for

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statutory grant as permitting violation of constitutional rights. *Greene* v. *McElroy*, 360 U.S. 474, 506-508 (1959); *Kent* v. *Dulles*, 357 U.S. 116, 125-130 (1957).

its First Amendment rights in four paragraphs, saying only that cable systems retransmit broadcast signals, that *Midwest Video* authorizes rules designed to achieve the Commission's program diversity "objectives," and that First Amendment goals are promoted by access rules, citing *Red Lion Broadcasting Co.*, *supra*, and language therein concerning an "uninhibited marketplace of ideas" and "monopolization of that market."

Assessment of the proper balance of First Amendment rights must be based on a record, not merely on argument regarding precedent or on resort to an "objectives" rubric. Government control of business operations must be most closely scrutinized when it affects communication of information and ideas, and prior restraints in those circumstances are presumptively invalid. *See Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963). "The line between informing and entertaining is too elusive for the protection * * *" of First Amendment rights to turn on that distinction. *Winters* v. *New York*, 333 U.S. 507, 510 (1948).

In wresting from cable operators the control of privately owned facilities for transmission of programs not acquired from public airwaves, the Commission makes no effort to show that action to have been necessary to protect a "clear public interest, threatened not doubtfully or remotely, but by clear and present danger," or to show "the gravest abuses, endangering paramount interests [which would] give occasion for permissible limitation." *Thomas* v. *Col-*

lins, 323 U.S. 516, 530 (1945). As the Court described the majority error below in *CBS*, *supra* at 126, the Commission appears to have "minimized the difficult problems" created by its access rules, and thus "failed to come to grips" with the important First Amendment considerations present—"the risk of an enlargement of government control over the content of [cablecast] discussion of public issues."

In its desire to accommodate "users who would otherwise not likely have access to television audiences," *1976 Report*, 59 F.C.C.2d at 296, the Commission made no delineation of whether cable systems, absent imposition of its access rules, are public forums. If they are not, it would appear that the present access rules cannot withstand constitutional muster. Every individual's right to speak, precious and paramount as it is, does not include every individual's right to be given the possibility of an audience by government fiat, or to speak in a non-public forum, like a newspaper, a magazine, or on the Senate floor. *See American Communications Association* v. *Douds*, 339 U.S. 382, 394 (1950); *Avins* v. *Rutgers, State University of New Jersey*, 385 F.2d 151, 153 (3rd Cir. 1967), *cert. denied*, 390 U.S. 920 (1968). The First Amendment rights of cable operators rise from the Constitution; the public's "right" to "get on television" stems from the Commission desire to create that "right."

It is not enough, therefore, to merely cite the retransmission of broadcast signals by cable systems. As above indicated, no nexus exists between the function of retransmitting broadcast signals and the distinct function of cablecasting. *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, *supra*. Cablecasting is communicating, requiring thorough and penetrating consideration of the communicator's First Amendment rights.[70] Cablecasting, however, involves no transmitting over the airwaves or the use of signals acquired from the airwaves.[71]

If there be any arguable relationship between cablecasting and retransmission, it would appear far too tenuous and uncertain to warrant a cavalier overriding of First Amendment rights present in cablecasting.

Concurring in *Home Box Office*, *supra* note 29, Judge Weigel expressed well the concern noted here, in stating:

> [T]he Commission lacks the power to control the content of programs originating in the studios of cablecasters. Such programs involve neither retransmission of signals received over the air from conventional television broadcasting nor transmission over television broadcasting frequencies. They are offered to users of television

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[70] Communication via cable has been held to constitute protected speech, *Weaver* v. *Jordan*, 64 Cal.2d 235, 411 P.2d 289, *cert. denied*, 385 U.S. 844 (1966); as have movies, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952).

[71] The Commission's authority to regulate with respect to the technicalities involved in cable systems' use of *microwaves* was recognized by this court in *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968).

> sets on terms the users are free to accept or reject.
>
> * * * In relation to cablecasting, the power is so fraught with the potential for impingement upon First Amendment rights that it should not be sanctioned by implication.

Under its *1976 Report* access rules, the Commission is present in each cable operator's studio, holding open the door to all who wish to enter and use it, (turning its back, however, as we shall see, when the pornographer enters). Under some circumstances, the Commission's access rules effectively silence the cable operator, denying him all use of his own facilities, for *any* exercise of his First Amendment rights. *1976 Report*, 59 F.C.C.2d at 316-17. The Fairness Doctrine applicable to cablecasting, 47 C.F.R. § 76.209, would involve the Commission when circumstances give rise to its application, but application of that doctrine to access programs has not on this record been considered by the Commission.[72] The constitutional considerations generated by its access rules require the Commission to evaluate carefully the extent to which it may reside in the studios of cablecasters as one of the issues too sensitive to permit superficial dismissal on the mere ground that cable

[72] One commentator believes that access rules were the Commission's way out of "the fairness cave." Price, *supra* note 5, at 551-52 n.61. *See* note 62 *supra*, regarding the dilemma noted by the Court in *CBS*, respecting the application or waiver of the Fairness Doctrine when public access is mandated.

operators, in a separate activity, retransmit broadcast signals.

Though neither *Southwestern* nor *Midwest Video* dealt with First Amendment concerns, the Commission says it "contemplated" third party access as among its "objectives" in issuing the origination rule approved in *Midwest Video*. If that be so, what may have rested on the backroads of the Commission's mind is irrelevant. Our interest is in what the Commission did; and what it did in *Midwest Video* is entirely distinct from what it did here.

Moreover, our concern at this point is with a fundamental First Amendment difference, which the Commission appears to ignore. Under origination the cable operator may permit access of third parties of *his selection*, and retain ultimate *editorial discretion* and *responsibility* regarding what *programming material* goes out over his lines. Under the present access rules he may choose neither user nor material.

The irrelevance of "objectives," as a sole basis for jurisdiction, is even more apparent when objectives are cited as sole justification for access rules, regardless of their effect on First Amendment rights. *Red Lion*, *supra*, involved application of the Fairness Doctrine to broadcast television. Its language cannot validate the present access rules or justify a disregard of the constitutional concerns they entail. Citation of *Midwest Video* and *Red Lion* cannot serve as a basis for failure to make the First Amendment evaluations required here.

The Commission does not favor us with any views as to: (1) why cable systems are not entitled to the same First Amendment rights as other private media, such as newspapers and movie theatres; (2) how compelled access to cable facilities is distinguishable, in a First Amendment context, from compelled access to broadcast facilities; or (3) how its rule, 47 C.F.R. § 76.256(d)(1)-(3), requiring cable operators to exercise prior restraint of obscenity,[73] and the exposure of cable owners to law suits resulting from its access rules, can be justified. Though we refrain from resting our decision on the Constitution, we note the emphasis in the Commission's brief on the notion that access is old and established ground; but when serious First Amendment questions are raised, *deja vu* will not do.

In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), the Court held unconstitutional a state effort to compel access to the pages of a newspaper, even for the limited purpose of attack-response. In *Home Box Office*, *supra* note 29, at 72, the court said:

> [S]carcity which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the First

[73] The Commission's request for remand in *American Civil Liberties Union* v. *FCC*, Case No. 76-1695 (D.C. Cir.), indicating the possibility of repeal of prior censorship responsibilities, has no effect here. The Commission may elect not to repeal the rule, and repeal would not resolve other problems involved in the access rules generally. *See* note 19 *supra*.

> Amendment rights of the conventional press, *see Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 247-256 (1974), and there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point. [footnote omitted]

The present access rules strip from cable operators, on four of their channels, all rights of material selection, editorial judgment, and discretion enjoyed by other private communications media, and even by the "semi-public" broadcast media. Cable operators must allow use of their facilities, for transmission toward their paying subscribers, of *any* program material, no matter the quality, interest, relevance, taste, context, beauty, or scurrilousness (short of obscenity, when prior restraint is physically possible, *infra*). They must lease a channel to any person, regardless of business reputation, competence, or financial standing. They must permit third-party installation of equipment on the sets of their subscribers who want to watch the third party's program.[74]

Though the Commission's logic would apply, and its "objectives" would be as well achieved, and though newspapers "retransmit" hundreds of government press releases, we assume that no government agency

[74] The Commission places the burden on the cable operator to prove that inferior equipment will *harm* his system's service before it will permit him to refuse installation, and requires that he permit a test installation over a reasonable time to determine whether harm will result, though it recognized that "posting bond may be appropriate" during the test period. *Memorandum Opinion and Order*, 62 F.C.C.2d 399, 404 (1976).

has the fatal-to-freedom power to force a newspaper to add 20 pages to its publication, or to dedicate three pages to free, first-come-first-served access by the public, educators, and government, or to lease a fourth page on the same basis, or to "advance the public interest by opening of [letters-to-editor columns] for use by public and other specified users who would otherwise not likely have access to [newspaper] audiences."

Despite the Court's guidance in *Miami Herald*, *supra*, the Commission has attempted here to require cable operators, who have invested substantially to create a private electronic "publication"—a means of dissiminating information—, to open their "publications" to all for use as *they* wish. That governmental interference with the editorial process raises a serious First Amendment issue. Though we are not deciding that issue here, we have seen and heard nothing in this case to indicate a constitutional distinction between cable systems and newspapers in the context of the government's power to compel public access.

If the Commission has any authority to intrude upon the First Amendment rights of cable operators, that authority, as above indicated, is less, not greater than its authority to intrude upon the First Amendment rights of broadcasters. Were it necessary to decide the issue, the present record would render the intrusion represented by the present rules constitutionally impermissable.

The *1976 Report* spawns a further, and serious, constitutional difficulty of another sort. The Commission's access rules require cable operators to create and operate a public forum, with no control of its content, but with an obligation of suppressing speech the government could suppress because of obscenity or indecency. 47 C.F.R. § 76.256(d)(1)-(3).[75] In so mandating, the Commission appears to have created a corps of involuntary government surrogates, but without providing the procedural safeguards respecting "prior restraint" required of the government.[76] In *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 560 (1975), the Court described those safeguards as: (1) the censor must initiate judicial proceedings and prove the material unprotected; (2) restraint prior to judicial review can be only for a brief period, to preserve the status quo; and (3) prompt judicial determination must be assured.

When cable operators asked how they could censor obscenity in the open access system required by the

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[75] Midwest's standing to raise the constitutional rights of cable *users* has not been challenged. *See* Note, *Standing to Arrest Constitutional Jus Tertii*, 88 Harv. L. Rev. 423 (1974); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

[76] In *CBS*, *supra*, at 115 *et seq.*, the Court said broadcasters are not engaged in government action just because they are permitted to use the airwaves. Here the government *requires* cable operators to censor. The Court said the First Amendment does not reach acts of private parties in every instance in which the Commission or Congress merely permitted or failed to prohibit the speech-denying act complained of. 412 U.S. at 119. Here the Commission has *ordered* such acts.

1976 Report, the Commission issued a *Clarification*, *supra* note 19, which stated that cable operators *must* "enforce" the rule, and must proscribe all obscene and indecent matter, and, "Indeed, he is responsible to the Commission for doing so." 59 F.C.C.2d at 984. The Commission said cable operators should exercise a prior restraint when possible, and, when that is not possible,[77] cable operators should exclude the offender from access in the future. Thus the Commission made the cable operator both judge and jury, and subjected the cable user's First Amendment rights to decision by an unqualified private citizen, whose personal interest in satisfying the Commission enlists him on the "safe" side—the side of suppression.

Nor does the *Clarification* appear to have dealt with the chilling effect which fear of future disbarment would have upon access users, (though it referred to such an effect on access services if cable operators had to pre-screen numerous programs). Neither did it discuss the effect on subscriber allegiance to a cable system which must permit live access programmers at least one bite at the obscenity apple. The *Clarification* "suggested" that "distasteful" programs be cablecast at hours that would "minimize exposure to children," but specifically refused

[77] Whether the Commission considered a requirement that all access programs be in the form of videotape, whether the cost of videotape to access users would have limited the Commission's desire to get absolutely everybody on cable television, or whether the commission considered assigning the cost of access videotapes to the cable consumers, is unknown.

to either require or prohibit such scheduling. 59 F.C.C.2d at 985. How any "scheduling" could be done, of programs unknown to and under no control of the operator, was not discussed. Nothing was said in the *Clarification* respecting the prior-restraint safeguards specified in *Southeastern Promotions, Ltd. supra*, or in *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

(b) Due Process

Midwest argues persuasively that the *1976 Report* mandatory construction and access rules constitute a taking of private property without just compensation and deny cable owners an opportunity to earn a fair rate of return, in violation of the due process clause of the Fifth Amendment.

The Commission makes no effort to show that its access rules do not violate the due process provisions of the Constitution. It merely dismisses petitioner's arguments on its "objectives" and on the ground that the same arguments were rejected by this court in *Black Hills Video Corp.* v. *FCC*, *supra* note 71, and by the Supreme Court in *Midwest Video*.

Though we find it unnecessary to resolve the issue, we have rejected the objectives argument above, and we suggest the inappropriateness of the Commission's legal precedent argument. That a violation of due process rights under the Constitution may not have been earlier found by a court, in reviewing regulations concerning cable's use of a microwave company's services and non-duplication rules, as in *Black Hills*, or concerning an origination rule, as in *Mid-*

west Video, cannot for a moment mean that due process concerns raised by the *1976 Report* mandatory construction and access rules may on that ground be dismissed. As in the matter of jurisdiction, each regulation must on its own pass, or fail to pass, constitutional muster.

In promulgating regulations requiring expenditures of many millions of dollars for construction and public dedication of additional channels and equipment, the Commission was not at liberty to disregard due process rights of cable operators, or of cable consumers to whom most if not all costs will be passed. Whether those rights be labeled "economic" or otherwise, they are not in our view obsolete.[78] The human right to own property is a most fundamental right, the alleged deprivation of which cannot be ignored because that right was found uninfringed, or overtaken by the public interest, in cases dealing with earlier and different regulations. If consumers' money is to be taken, in response to a federal regulatory agency's view of the public interest, it must be upon a record far less speculative than that at hand, and on a far stronger basis than court decisions relating to other regulations.

The present access rules, scraped free of argumentative barnacles, require the construction of fa-

[78] The brief of ACLU refers to Midwest's arguments as "obsolete notions of economic due process." Those relying on regulatory power and exuberance, to deliver over the facilities of another at no cost, may rue the day. The regulatory mind is normally unbiased; the regulatory rain falls on all.

cilities and their dedication to the public. Presumably, a requirement that facilities be built and dedicated without compensation to the federal government (for public use) would be a deprivation forbidden by the Fifth Amendment. A "taking" does not require that the government take title. *United States* v. *Kansas City Life Insurance Co.*, 339 U.S. 799 (1950); *United States* v. *Causby*, 328 U.S. 256 (1946). That the forced dedication be direct to the people, rather than indirect through their government, would appear to be of no constitutional moment.

We express concern, also, over the Commission's approach to a further problem engendered by its *1976 Report* regulations. When the cable operator, in policing his access channels, is considering whether an access user is being or has been "obscene" or "indecent,"[79] or whether access should be denied for any reason, there are ghosts in the wings. On one side lurks a fear of violating the Commission's rules, and potential loss of his "Certificate of Compliance." On the other stands the potential for violation of the access user's rights. The exposure of cable operators to law suits, by access users claiming prior restraint of their First Amendment rights, or interference with their new-found "right" to be on cable television whenever, and as often as they like, by the state for

[79] Considering the difficulties experienced by the courts in defining the obscene, the cable operator, were he to engage a battery of lawyers, could hardly be envied this part of the tasks imposed by the regulations under review.

his having transmitted obscene material, by outraged subscribers (whether outraged by obscenity or outraged by having to pay for it) or by persons denied access for any reason, is among the problems which do not appear to have been fully considered by the Commission in its removal of the cable operator's control over his system's programs. The Commission did speak of the censorship and law suit problem in its *Cable Report*, 36 F.C.C.2d at 196:

> We have adopted the no-censorship requirement in order to promote free discourse; this is, we believe, valid regulation having "the force of law." While the matter is of course one for resolution by the courts, State law imposing liability on a system that has no control over these channels may unconstitutionally frustrate Federal purposes. In any event, if a problem should develop in this respect, it is readily remedied by Congress and, in this connection, we would welcome clarifying legislation.[80]

And again on reconsideration:

> Various parties have questioned our judgment that there seems litle likelihood of civil or criminal liability against cable operators from the

[80] The Commission also indicated in its *Clarification* that it planned to seek legislation making obscenity and indecency on cable channels a federal crime. 59 F.C.C.2d at 985-86. Why, if cable casting be broadcasting, such legislation is needed in view of 18 U.S.C. § 1464 (1970) was not discussed. The Commission's monumental lack of success in obtaining legislation giving it general regulatory power over cable systems bodes ill for the notion that the problem is "readily remedied by Congress."

use of access channels. The parties contend, understandably, that our feeling in this matter, however persuasive, is hardly a guarantee. They note, further, that although the cable operator will have no control over program content on access channels, he is charged with proscribing the presentation of obscene material. It is suggested that to this extent, at least, the operator will, in effect, be required to exercise control. To clarify this area, we are requested to seek legislation to grant immunity to a system operating under our access rule. We, of course, appreciate petitioner's concern over the liability issue. We still believe, however, that existing case law solves most problems in this area [footnote omitted]. [*Reconsideration of the Cable Television Report and Order*, 36 F.C.C.2d 326, 357 (1972).]

The subjection of cable operators to potential liability because of the acts of third parties over which they have no control, and the burden and expense of cable operators in trying to convince state courts that the Commission's regulations supersede state law, was not addressed in the *1976 Report*.

The Commission, in its requirement that cable operators exercise prior restraint of obscenity in access cablecasting, attempts to transfer to cable operators the very censorship power statutorily forbidden to the Commission in § 326 of the Act.[81] The Com-

[81] For a review of the difficulties experienced by the Commission in dealing with obscenity and profanity in broadcasting, and the limited use of the criminal prohibition of 18 U.S.C. § 1464 (1970), *see* Note, *Filthy Words*, *supra* note 55.

mission's "belief" that cable operators would be free of legal liability because they were only following orders seems ill-founded when the orders are to do what it cannot do.

The aplomb with which the Commission is willing to forcefully expose cable operators to criminal and civil suits, with all of the uncertainties and serious liberty and financial risks involved in defending them, particularly in these years of America's litigious binge, raises serious questions, about the rationality of the access rules, about the lack of evidence showing a public interest so strong as to warrant them, and about the due process interests effected; all of which would require the closest judicial scrutiny if the access rules of the Commission were to be otherwise held within its jurisdiction.

III The Record

Because the mandatory access and channel capacity rules of the *1976 Report* exceed the jurisdiction of the Commission, we refer to the record only because our reference may be of use in further proceedings.

Concerning abandonment of its cable origination rule, the Commission stated:

> Quality, effective, local programming demands creativity and interest. These factors cannot be mandated by law or contract. The net effect of attempting to require origination has been expenditure of large amounts of money for programming that was, in many instances, neither

> wanted by subscribers nor beneficial to the system's total operation. In those cases in which the operator showed an interest or the cable community showed a desire for local programming, an outlet for local expression began to develop regardless of specific legal requirements. During the suspension of the mandatory rule, cable operators have used business judgment and discretion in their origination decisions. For example, some operators have felt compelled to originate programming to attract and retain subscribers. These decisions have been made in light of local circumstances. This, we think, is as it should be. [*Report and Order in Docket No. 19988*, 49 F.C.C.2d 1090, 1105-06 (1974).]

The Commission does not tell us how, if at all, its mandatory access rules would result in "[q]uality, effective, local programming" with the required "creativity and interest" by legal mandate; or why their "net effect" would not be an even greater "expenditure * * * for programming * * * neither wanted by subscribers nor beneficial to the system's total operation;" or why "an outlet for local expression" would not begin to develop under voluntary access "regardless of specific legal requirements" when a "cable community showed a desire" for access programs; or why, if such desire occurred, operators would not feel "compelled" to supply access programs to "attract and retain subscribers;" or why decisions on origination programming "in light of local circumstances" is "as it should be," while decisions on access programming in that "light" should

be denied by force of law to operators, subscribers, and local franchise authorities. In sum, the Commission, in mandating channel construction and public access, appears to have gone directly contrary to its origination experience.[82]

The Commission makes no response, on the merits, to Midwest's argument that the access rules are arbitrary, capricious, and irrational, but remains content to argue that the record information behind its *Cable Report*, by which it first adopted access rules, is not before us.

We do not here find it necessary to review the present record in the detail required when a decision turns on the nature of the rulemaking process, *Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). However, the *Cable Report* itself, the *1976 Report*, and its record information, are more than sufficient to illustrate the Commission-recognized speculative nature of the agency's mandatory access action, and

[82] The Commission's assertion that there is no real difference between origination and access rules is not accompanied by an indication that its hopes for access will prove any less forlorn, or its crystal ball any less clouded. The Commission mentioned access rules in the course of abandoning origination, but its assertion here, that access was merely substituted as a less burdensome requirement, suffers from comparison with its *actual* reason for abandoning origination, as formally expressed in its *Report and Order in Docket 19988, supra.* The Commission does not explain how massive rebuilding and public access are "less burdensome" on cable operators than no rebuilding and control of his facilities for his own origination.

to raise a serious question of whether it would be sustained on the administrative record.

Moreover, the right of Midwest, to whom access rules were first made applicable by the *1976 Report*, to judicial review of its challenge to the rationality of access rules *per se* is even more certain than that of petitioner in *Functional Music, Inc.* v. *FCC*, 274 F.2d 543 (D.C. Cir. 1953), where the underlying rules had long been applicable to petitioner.

The Commission's arbitrary approach to imposition of its "access concepts" appears reflected in the *1976 Report.* Disregarding the results of its flawed faith in origination, the Commission compelled construction of facilities on the obvious fact that failure to construct them would impede their use and on the mere theory and assumption that if they are built they will someday be used.[83] Throughout the *1976 Report*, the Commission describes most of its rules as involving "difficult" problems. In withdrawing and modifying its *Cable Report* rules, the Commission itself characterized some of those earlier rules as: imposing "a very significant burden * * * for which there is no reasonable forseeable need," 59 F.C.C.2d at 306; requiring a two-way capacity for which "developments * * * have been far slower than

[83] It would appear that the logic of this approach would have justified a government requirement for building 12,000 foot runways at every major airport in 1930, or rocket launching pads in 1947, when some were predicting and urging a flight to the moon. The Commission has forbidden the laying of a seventh transatlantic cable on the ground that it may not be used. *Report, Order and Third Statement of Policy and Guidelines in Docket No. 18875,* FCC 77-862 (Dec. 23, 1977).

was anticipated * * *," *id.* at 309; imposing a "burden [converter installation] we have required system operators to meet [we think] is unreasonable * * *," and imposing a cost on "the subscriber who must ultimately pay * * * whether or not he wishes to view the programming being provided * * *," and that may have impeded construction of cable systems in new communities. *Id.* at 313.[84]

In 1974, the Commission stated that it was "too early to discern any trends regarding our leased access channel rules," and that "access is still in its infancy and it has a long-hard-struggle ahead before it becomes an accepted part of the communication process in this country. We knew this would be the case when we instituted the rules * * *." *Clarification of the Cable Television Rules*, 46 F.C.C.2d 175, 185 (1974). Two years later, the *1976 Report* contains no discussion of any evidence or investigation of trends favoring leased or other access channel rules.

The Commission implicitly and explicitly recognized that there was insufficient evidence of demand for access programs, present or future, by users or viewers. Recognition of that lack of evidence, and the speculative roots of the present access rules,

[84] If jurisdiction existed, it would be necessary to consider a further issue. When the Commission first adopted its access rules, *Cable Report*, it compensated the affected cable systems, for the burdens imposed, with additional distant signal carriage. With no explanation, the Commission imposed access rules in the *1976 Report* for the first time on other cable systems with no compensation for the burdens thereby imposed.

[Footnote continued on page 87]

appear implicitly in the Commission's reliance on the need to build facilities so they can create their own use, and in its specific refusal to rely on the marketplace. Explicitly, the *1976 Report* contains: "While the overall impact that use of these [access] channels can have may have been exaggerated in the past, nevertheless we believe they can, if properly used, result in the opening of new outlets for local expression * * *," 59 F.C.C.2d at 296; "there may be need [outside major television markets] for access services * * *." *Id.* at 300. "In addition, the audiences viewing access programming on such [small systems inside major markets] may reasonably be expected to be so small that a federally imposed requirement would appear inappropriate." *Id.* at 303. "Based upon the comments filed in this proceeding as well as those filed in Docket 20363 and our experience generally, while it would appear that the use of access channel is growing, in the vast majority of communities presently providing multiple channels for access use, *these channels are at best sporadically programmed.*" *Id.* at 314 (emphasis added). On reconsideration, speaking of possible denial of access services by cable operators, the Commission said, "Our present experi-

[84] [Continued]

Concerning the compulsion of massive expenditures for cable structures that may never be used, and the cost of which is not recoverable, the *1976 Report* appears to dismiss objection with a touch of the *sang froid*: "when it appears, based on our experience in administering our rules, that they are unnecessarily burdensome * * *, we change them." 59 F.C.C. 2d at 326.

ence has been, however, that *even larger systems typically have difficulty finding access channel users* so this problem with smaller systems is not likely to arise with any frequency." 62 F.C.C.2d at 403 (emphasis added).[85]

The Commission's apparent inability, or unwillingness, to assemble a rational factual basis for its belief that its "access concept" will "work" is the more surprising in view of its relatively long experience with the subject.[86] Seven years before the *1976 Report*, the Commission referred to a possible future requirement for leased access, and adopted the "basic

[85] The Commission devoted a paragraph, *1976 Report*, ¶ 9, 59 F.C.C.2d at 296, to recognition that "public benefits must be carefully weighed against the costs * * *," but the "weighing" related only to the more burdensome construction rules of its *Cable Report*, not to its access concept. The Commission stated that its 1976 rulemaking related only to alternative methods "by which it might reaffirm its commitment to access programs * * *," *id.* at 295; that its 1972 commitment "should not be abandoned," *id.* at 296; and that it had a "basic determination to retain channel capacity and access rules," *id.* at 297. In its *Memorandum Opinion and Order*, 62 F.C.C.2d 399, reconsidering its *1976 Report*, the Commission stated, "There should be no mistake regarding the Commission's continuing commitment to the provision of access services and channels. However, as we stated in the *Report and Order*, this is a very difficult area. Our general reevaluation of the 1972 rules was not intended to reverse our position * * *." *Id.* at 401.

[86] So far as appears in the record, the Commission did not consider the possibility of Commission-designed questionnaires sent by cable operators to their subscribers and returned by the subscribers to the Commission, to determine viewer interest.

goal" of maximum program choice through public access to cable facilities. *CATV, First Report and Order*, 29 [sic] F.C.C.2d 201, 205-06 (1969). Its coercive reach for that goal occurred in 1972, four years before the *1976 Report*, when it issued the channel construction and access rules of the *Cable Report*. In the *Cable Report*, the Commission stated that its judgments on how access would evolve were "intuitive" and that "necessary insights" would be needed. 36 F.C.C.2d at 194, 197, 352. In 1974, two years before the *1976 Report*, the Commission repeated its dedication to use of the public power in pursuit of its predilection for access. *Clarification of the Cable Television Rules*, 46 F.C.C.2d 176, 179-80 (1974). In 1976, still devoid of evidence that any meaningful present or future public demand for access could be expected, the Commission introduced its present action by saying, "We wish to emphasize at the outset that we do not intend in this proceeding to abandon our goals for access cablecasting; * * *." *Notice of Proposed Rule Making*, 53 F.C.C.2d 782, 784 (1976).

In its *1976 Report*, as above indicated, the Commission adhered to its faith in access as a naked "concept," refusing to seek evidence that the public interest would not be harmed by mandating consumer expenditure of millions for equipment never used.[87]

[87] The record of the *1976 Report* is replete with comments that, though there was "awareness" of access programs, few people with something to say were interested in producing them; that almost no one wants to watch in many segments of our vast country; that when access had been tendered it had

The Commission's refusal "to leave the provision of channel capacity and access services entirely to the marketplace * * *," 59 F.C.C.2d at 321, appears contrary to the law limiting the Commission within its statutory jurisdiction, where access to broadcast facilities is governed not by regulation but by market forces. *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 407, 475 (1940).

It is not readily apparent that the present rules were based on a clear administrative record that shows existence of a *problem* justifying intrusion on First Amendment rights, or that relates a "solution" to the agency's statutory mandate as required by

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not been used and had been rejected by subscribers; that offers of access had been declined by schools which owned television equipment for its use; that a survey of 149 cable systems showed their access channels, offered under the *Cable Report* rules, went unused an average of 92% of the time; that another survey of 10,000 subscribers showed 97% disinterested in viewing access programs if they cost $1.75-$2.00 per month; that access programs had been voluntarily provided when subscriber interest warranted them. There was no evidence that ordinary market demand could never result in access programs, or that a solemn silence would descend in the absence of mandatory access rules. There was no evidence that programs of so little interest or value that no one and no group is willing to purchase time to present them would garner viewers.

Lack of evidentiary support in the record is asserted by both petitioners. ACLU points out that the Commission has not named the access-supporting groups it says it solicited for comment, or disclosed the criteria used in selecting them, and argues that the economic data reflected a much smaller burden than that used to justify the modification made to the construction requirements of the *Cable Report*.

United States v. *O'Brien*, 391 U.S. 367 (1968). Further, the mandatory access rules explicitly and candidly appear to curtail expression indirectly by favoring access seekers over cable system owners, contrary to the injunction of *Madison Joint School District No. 8* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976).

There may rarely be time for complete answers and insights, but the Commission appears to have here failed to defensibly articulate a rationality for its access rules. If jurisdiction were present, and it were therefore necessary to give the present record the "hard look" referred to by Judge Leventhal in *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), it is at best doubtful that a court could avoid finding it reflective of agency action arbitrary and capricious.

Conclusion

The *1976 Report* mandatory channel capacity, equipment, and access rules exceeded the jurisdiction of the Commission. Accordingly, they are set aside.

Webster, Circuit Judge, concurring.

I concur in the Court's decision to set aside the Commission's regulations because they are outside the statutory jurisdiction conferred on the FCC in the area of cable television. (*See* Part I of the opinion.) While I am in general agreement with the extensive and well-reasoned analysis of the constitu-

tional questions contained in Chief Judge Markey's opinion (*see* Parts II and III), I refrain from joining it because disposition of the case on the jurisdictional basis makes it unnecessary to reach those questions.[1]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[1] Chief Judge Markey makes it abundantly clear that Parts II and III are not necessary to the result. *See* Slip Op. at 57, 63, 65, and 68.

APPENDIX B

F.C.C. 76-313

[59 F.C.C.2d 294]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Docket No. 20508

In the Matter of

AMENDMENT OF PART 76 OF THE COMMISSION'S RULES AND REGULATIONS CONCERNING THE CABLE TELEVISION CHANNEL CAPACITY AND ACCESS CHANNEL REQUIREMENTS OF SECTION 76.251

REPORT AND ORDER

(Proceeding Terminated)

(Adopted: April 1, 1976; Released: May 13, 1976)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONERS WASHBURN AND ROBINSON CONCURRING AND ISSUING STATEMENTS.

1. Effective March 31, 1972, the Commission adopted the *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143 (1972), which, *inter alia*, included various channel capacity and access channel requirements for systems located in the major

television markets.[1] In general, systems commencing service after March 31 1972, (hereinafter referred to as new systems) were expected to fully comply with these requirements on commencing service, while systems already in operation as of that date (old systems) were given five years, that is until March 31, 1977, to reconstruct their plant and distribution networks, purchase new equipment, provide minimum studio facilities for the public access channel, and come into full compliance with these requirements.

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[1] These requirements have been contained in Section 76.251 of the Rules, the pertinent provisions of which may be summarized as follows:

Channel Capacity Requirements

1. 20-channel capacity available for immediate or potential use (76.251(a)(1));

2. For each broadcast channel used, an equivalent amount of bandwidth available for non-broadcast purposes (76.251(a)(2));

3. Technical capacity for non-voice return communication (76.251(a)(3));

Access Channel Requirements

4. A single channel each for public, educational, local government and leased channel use (76.251(a)(4)-(a)(7));

5. Equipment and facilities necessary for the production of programming on the public access channel (76.251(a)(4));

6. The provision of additional access channels based upon the utilization of those in existence (76.251(a)(8));

7. The provision of public, educational and governmental access services under certain circumstances at no charge (76.251(a)(10)(i)-(ii)).

[295] 2. In *Public Notices* respectively dated May 15 and 17, 1974, the Commission announced the creation of Re-Regulation and 1977 Task Forces. In an effort to continually review its regulatory program the Commission charged these Task Forces with conducting an examination of all of its rules and regulations respecting cable television. The common goal of the two Task Forces was to study the problems posed by the cable television rules and regulations for the Commission, local franchising authorities and the cable television industry, and to make appropriate recommendations with respect to how these rules might be refined to more fully serve the public interest. The 1977 Task Force was specifically established to study the problems posed by the March 31, 1977 deadline for achieving compliance with the cable television rules.

3. Responding to the recommendations of the 1977 Task Force the Commission adopted the *Notice of Proposed Rulemaking in Docket 20363*, FCC 75-211, 51 FCC 2d 519 (1975), which requested comment upon the necessity of postponing or cancelling the March 31, 1977 reconstruction deadline in view of economic considerations. In that *Notice* the Commission confined its inquiry to the amount of capital required to comply with its reconstruction requirements, the availability of such capital in the marketplace and the overall ability of the industry to achieve compliance by March, 1977. The Commission indicated that an additional Notice would be issued in-

quiring into alternative methods by which it might reaffirm its commitment to access cablecasting for old systems while recognizing the economic realities posed by system reconstruction. It also stated that in the additional rulemaking Notice it would address certain other matters respecting its channel capacity and access channel requirements for both new and old systems.

4. On June 3, 1975, the Commission adopted the *Notice of Proposed Rulemaking in Docket 20508*, FCC 75-644, 53 FCC 2d 782 (1975), which constituted that additional *Notice*. On July 9, 1975, the Commission adopted its *Report and Order in Docket 20363*, FCC 75-821, 54 FCC 2d 207 (1975), which cancelled the March 31, 1977 reconstruction date and suspended any requirement that older systems reconstruct to comply with the channel capacity and access channel requirements pending the outcome of its June 3, 1975 *Notice*.

5. In its June 3, 1975 *Notice*, the Commission requested comment on a variety of matters which related to its channel capacity and access channel requirements. In addition to soliciting views on various alternatives to the March 31, 1977 uniform reconstruction deadline, the Commission determined to reexamine the criterion (location within the 35-mile zone of a major television market) presently utilized to trigger its channel capacity and access requirements for both new and old systems. Also included in that *Notice* was a reexamination of the "two-way,"

"one-for-one" and "converter" requirements for both new and old systems.[2]

[296] 6. In an effort to obtain the views of as many interested parties as possible, the Commission gave broad notice of the matters contained in *Docket 20508* and individually solicited the opinions of over 100 public interest, access, educational and citizens groups. The Commission has received a significant number of responses from various parties, including cable television interests; broadcast interests; public interest and access organizations; individual members of the public; state and municipal cable regulators; educational authorities; and electronic equipment suppliers, submitting diverse observations, opinions and proposals. Comments of all parties were carefully studied and considered. While some parties' comments touched upon matters of more direct relevance to the Commission's *Notice in Docket 20363*, they were largely responsive to this more general *Notice*, and many will be noted accordingly.

7. Based on the comments filed, our experience with the existing channel capacity and access rules since 1972, and a general re-evaluation of these rules in connection with this proceeding, we have determined that several major modifications in our requirements

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[2] The "one-for-one" and "two-way" requirements are contained in Sections 76.251(a)(2) and (a)(3) respectively. The installation of a converter is necessary for certain systems to actually provide the four access channels required pursuant to Sections 76.251(a)(4)-(a)(7) of the Rules. This requirement is discussed in greater detail in paragraph 54 *et seq.*

are necessary. In making these changes we have taken into account a number of important and frequently countervailing considerations.

8. First, we continue to believe that the public interest can be significantly advanced by the opening of cable channels for use by the public and other specified users who would otherwise not likely have access to television audiences. A commitment was made to the provision of these channels in the 1972 Rules which should not be abandoned. There is, we believe, a definite societal good in keeping open these channels of communication. While the overall impact that use of these channels can have may have been exaggerated in the past, nevertheless we believe they can, if properly used, result in the opening of new outlets for local expression, aid in the promotion of diversity in television programming, act in some measure to restore a sense of community to cable subscribers and a sense of openness and participation to the video medium, aid in the functioning of democratic institutions, and improve the informational and educational communications resources of cable television communities.

9. On the other hand, these public benefits must be carefully weighed against the costs the requirements impose. Not only are there costs involved that are directly passed on to subscribers and reflected in the profit and loss statements of cable operators, there are opportunity costs involved as well. Monies expended to comply with these requirements could have been expended in the construction of new cable sys-

tems where none now exist or in the development and provision of different services which might be given a higher value by the public. And, in addition to the direct capital and other expenditures which the requirements entail, there are the other costs in lost flexibility and initiative which are likely to follow with any attempt to impose detailed governmental regulations on private business concerns. Thus, abstract notions of public good must be carefully tested as to their cost and practical, realistic impact.

10. Bearing in mind these conflicting concerns, we have determined to make a number of significant changes in the rules. These changes may be briefly summarized as follows:

[297]

—Delete from the rules entirely the requirement that major market cable systems have the capacity to provide one non-broadcast channel for each channel used to distribute broadcast programming.

—Cease applying the channel capacity and access rules to those systems which, based on a headend or integrated system count, have fewer than 3,500 subscribers.

—Apply all of the channel capacity and access rules to all systems or conglomerates of systems with 3,500 or more subscribers, regardless of whether they are located inside or outside of one of the major television markets.

—Apply the access channel rules on a headend or conglomerate system rather than a community basis so that, in those situations where

an access channel or channels are required, only one channel of each type will be required per integrated system, even if that system serves more than one community.

—Modify our requirements that old systems reconstruct to provide four dedicated access channels, and new systems provide such channels from the commencement of operations.

—Require the provision of four access channels only on those systems that have sufficient activated capacity to provide such channels and only require such channels to be activated as an actual demand for their use develops. For those systems with insufficient activated capability to provide four channels, require the provision of one composite access channel, except in the case of existing systems whose activated channel capacity is completely full, require that access be provided on exclusivity and nonduplication time.

—Require that systems expand the number of channels available for access programming up to the limit of each system's activated channel capability based upon demonstrated use. In no case require the installation of a converter to meet access needs.

—Require those systems with greater than 3,500 subscribers to reconstruct and comply with our channel capacity requirements by 1986.

—Require that two-way capacity be installed on all systems with 3,500 or more subscribers, but not require that any system reconstruct solely to provide this capacity.

11. Each of these matters is discussed in detail below along with a summary of the comments received in response to the *Notice* in this proceeding. However, in view of our basic determination to retain channel capacity and access rules of some type, it is appropriate, before turning to the specific changes adopted, to address a number of arguments raised in the comments that challenge either the constitutionality of the channel capacity and access requirements, or the authority of the Commission to impose them.

12. By far the most extensive comments filed raising these points were those of the Midwest Video Corporation. These arguments in general parallel those raised by Midwest in its appeal of the Commission's adoption of Section 76.253 (the equipment availability requirement) in the *Report and Order in Docket 19988*, FCC 74-1279, 49 FCC 2d 1090 (1974). Their argument has basically five parts: a) that the access rules are equivalent to common carrier regulation and that the Commission has no authority to convert cable systems into common carriers; b) that the requirement to provide channels free for the use of others is an unconstitutional taking of private property for public use without just compensation in violation of the Fifth Amendment to the Constitution; c) that even if not an unconstitutional taking, the regulations violate the Fifth Amendment as restrictions on a lawful business activity, for they constitute an unnecessary interference with personal or property rights and are not reasonably structured to attain

[298] a valid legislative purpose; d) that the due process clause prohibits governmental requirements necessitating a change in the basic nature of a business enterprise; and e) that the access and channel capacity requirements violate the First Amendment by interfering with the rights of cable operators to communicate.

13. These arguments do not persuade us that the adoption of reasonable channel capacity and access channel rules are either unconstitutional or beyond our jurisdiction. The Communications Act allows the Commission significant discretion in dealing with the developments, demands, and public interest benefits inherent in the dynamic field of communications. The Commission's authority to adopt reasonable cable regulations has been upheld on a number of occasions in several different contexts.[3]

14. In adopting rules to develop the potential of cable television with its abundant channel capacity, as a purveyor of diverse programming, the Commission was affirmed in *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972). The Supreme Court affirmed the Commission's decision to go beyond mere protective measures and also regulate cable with a view to "promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." 406 U.S. 649, 665. Among those objectives recognized by the Court are increasing the number of outlets for local self-expression and augmenting the diversity of programs and types of services available to the public.

[3] *United States* v. *Southwestern Cable Co.*, 392 U.S. at [sic] 157 (1968); *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968); *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972); *General Telephone Co. of California* v. *FCC*, 413 F.2d 390, 398 (D.C. Cir. 1969); *General Telephone of the Southwest* v. *U.S.*, 449 F.2d 846, 863-64 (5th Cir. 1971); *A.C.L.U.* v. *FCC*, 523 F.2d 1344, 1351 (9th Cir. 1971).

15. The Supreme Court upheld the agency's determination that the program-origination rule would serve those objectives. It is equally plain that channel capacity and access requirements will promote those objectives. In fact, the concept of access was included within the Commission's policy determination which was before the Supreme Court in the *Midwest Video* case. The Commission had stated in its *First Report and Order*, adopting the origination rule, that one of the reasons for origination requirements was "to insure that cablecasting equipment will be available for use by others . . ." 20 FCC 2d at 214, quoted in 406 U.S. at 653n. 5; see also 20 FCC 2d at 209. The Supreme Court in affirming the Commission's authority was clearly aware that the cablecasting contemplated by the Commission included not only programs produced by the cable system but also programs produced by others. We believe the rules under consideration in this proceeding will further the achievement of long-standing communications regulatory objectives by increasing outlets for local self-expression and augmenting the public's choice of programs and that as such they are within the scope of the Commission's regulatory authority over cable television systems that has been upheld by the Supreme Court.

16. Arguments that the rules deny due process, are unduly burdensome, confiscatory, and force cable operators to change the nature of their business, are also arguments which were before the Court in *U.S.* v. *Midwest Video* and, although in that proceeding the charge was that the Commission had forced cable operators into the broadcasting busi- [299] ness against their will, we believe the rationale of the Supreme Court's holding in that proceeding is equally applicable here.

17. With respect to the argument that the access requirements are in effect common carrier obligations which are beyond our authority to impose, we have said that in our view cable systems "are neither broadcasters nor common carriers within the meaning of the Communications Act" but rather that "cable is a hybrid that requires identification and regulation as a separate force in communications." *Cable Television Report and Order, supra,* at paragraph 191. So long as the rules adopted are reasonably related to achieving objectives for which the Commission has been assigned jurisdiction we do not think they can be held beyond our authority merely by denominating them as somehow "common carrier" in nature. The proper question, we believe, is not whether they fall in one category or another of regulation—whether they are more akin to obligations imposed on common carriers or obligations imposed on broadcasters to operate in the public interest—but whether the rules adopted promote statutory objectives. We think they do.

18. Finally, we cannot agree that rules of the type under consideration, which have as their foundation an increased opportunity for communications and a furtherance of First Amendment objectives can be found wanting, as an intrusion on the First Amendment rights of cable operators. When broadcasting, or related activity by cable television systems is involved, First Amendment values are furthered by "an uninhibited marketplace of ideas" in lieu of "monopolization of that market" by the government or a private broadcaster or cable owner. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 390 (1969).[4]

19. In sum, we do not agree that there are either jurisdictional or constitutional arguments that require us to terminate this proceeding by eliminating the channel capacity and access rules. Having reached that conclusion, we turn to a discussion of the particular rules changes under consideration in this proceeding.

Criterion for the Imposition of the Channel Capacity and Access Channel Requirements

Introduction.

20. In adopting the *Cable Television Report and Order, supra,* we tied our channel capacity and access

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[4] We note that although the cable television access rules were not before the Supreme Court in *Columbia Broadcasting System* v. *Democratic National Committee,* 412 U.S. 94 (1973), the Court there discussed the possibility of a "limited right of access that is both practicable and desirable" and then referred specifically to the Commission's cable television public access channel rules.

channel requirements to those systems which were located in the major markets. By allowing these systems greater distant signal carriage we hoped to stimulate the expansion of cable into the major markets; and by imposing channel capacity and access channel obligations on such systems we sought to insure that the growth was accompanied by the provision of nonbroadcast services to these presumably more populous communities. In addition, systems serving these communities were selected to provide access services as a result of the belief that

> . . . cities in the top 100 markets have, as a general rule, more diverse minority groups (ethnic, racial, economic, or age) who are most greatly in the need of both an [300] opportunity to express their views and a more sufficient method by which they may be apprised of governmental actions and educational opportunities. 36 FCC 2d at 197.

21. In commencing this proceeding we noted our continued belief that potential access need is most apparent in larger communities. We also indicated that the major market rule is often inappropriate to meet that need. Within 35 miles of a major market television station there exists not just the central core city but many smaller communities. Many of these communities, because of their size, cannot realistically be expected to have in the near future a demand for the complete range of access services required by our rules. And because of their limited subscriber and revenue potential, compliance with our requirements has posed, we felt, an undue burden for many of these systems.

22. In addition, many very large systems serving large regional population centers have never been required to comply with our access or channel capacity requirements merely because they are located outside of the 35-mile zone of a major television market, yet there may be an equal need for access services in many of these communities. A system operating outside of a television market may provide its community with the only potential for access to a medium of visual communication. As we noted in our June 3rd *Notice*:

> . . . the lack of adequate off-the-air television service in many of these larger communities has resulted in the operating systems obtaining large penetration rates and, generally, financial viability. This viability would seemingly facilitate compliance with our requirements. By providing requisite access services, it is our belief that these systems would more fully serve the communities within which they operate. 53 FCC 2d 782, 792.

23. In our June 3 *Notice*, we sought comment on various alternatives to the present major market trigger. In lieu of this criterion, comment was sought on the possibility of requiring compliance with these requirements based upon system or community size, system profitability, penetration rates or other related indices. The major thrust of these proposals was to exempt from the requirements some smaller

systems to which they now apply and to apply the requirements to some larger systems which are not now subject to the requirements. Comment was also requested on the advisability of determining subscriber count based upon the present definition of a cable television system, which focuses on individual political subdivisions, or alternatively employing for this purpose a conglomerate headend approach.

Comments

24. Parties responding to this part of the Commission's inquiry provided diverse proposals. Midwest Video, as previously noted, argues that the imposition of any channel capacity and access channel requirements regardless of whatever trigger is chosen exceeds the Commission's jurisdiction, violates their constitutional rights and is contrary to public policy. Others assert that marketplace demand is sufficient to foster the provisions of expanded services and that the perceived need to adopt regulations over these matters is evidence that the services required will not be profitable. Thirty cable system operators filing joint comments favored the adoption of an approach tied to number of subscribers as most reflective of a system's ability to finance access channel and channel capacity obligations. These parties suggest the adop-
[301] tion of a 25,000 subscriber figure as the level upon which to base the Commission's requirements. Other cable television interests, including the National Cable Television Association, urge either the complete elimination of channel capacity and access channel requirements or alternatively an exemption for smaller systems within major television markets. Central California Communications Corporation, for example, suggests the maintenance of the present criteria with an exemption for those systems which have fewer than 3,500 subscribers. Michigan CATV Company and Coldwater Cable Television, Inc., urge the Commission to raise any exemption to 5,000 and exempt systems with either less than that number of subscribers or systems which operate in communities with fewer than 15,000 people.

25. Other parties, including various members of the Cable Television Information Center of the Urban Institute, Urban Planning Aid Inc., the Joint Council on Educational Telecommunications and private citizens, Linda Therkelson and Elaine O'Neil, suggest a multitiered approach based on subscriber count. Under these proposals, a system operator's access and channel capacity obligations would increase in incremental amounts in direct proportion to the number of subscribers which the system has. Accordingly, systems with, for example, fewer than 1,000 subscribers might have to provide a channel for access use without providing the facilities for the production of programming. Systems with between 1,000 and 3,500 subscribers might provide one channel with limited production facilities. Once a system obtains 3,500 subscribers under several of these proposals it would be subject to the full panoply of channel capacity and access channel obligations imposed by our rules.

26. In support of limited access requirements for smaller systems, the Joint Council of Educational Telecommunications argues that many local school systems, colleges and universities have their own production facilities and access could, therefore, be provided "at a cost . . . no greater than that of an audio visual modulator." In a similar vein, Dr. Robert Fina points to the fact that Kutztown State College originates programming into the Borough of Kutztown through a cable system "which has far less than 3,500 subscribers" and provides the Borough "with its only means of local television news coverage."

27. Various other parties including Storer Broadcasting, the City of Eugene, Oregon, Leon County Public Library, and the Committee on Regulation and Legislation of Video and Cable of the Communications Section of the American Association of Libraries, while favoring the adoption of an approach tied to subscriber count or percent of cable system penetration do not suggest what the appropriate subscriber count or percent of penetration might be.

28. Opposing an approach tied to subscriber count, Metromedia argues that a cable system's channel capacity is already determined by the time that the first subscriber is signed up and, therefore, any trigger based upon subscriber count leaves the operator unable to determine his responsibilities. Other broadcast interests, in urging the retention of the major market criteria for the imposition of the access rules, assert that these requirements are the *quid pro quo*

for the additional signal carriage permitted systems in the major markets.

29. An opposite approach is suggested by various members of the San Diego School system and the National Education Association, who [302] argue that any requirement that a cable system provide access services should be based upon the absence of other electronic communications services within the community. In support of this position, it is asserted that many smaller communities which do not have local radio or television coverage actually have a greater need for access channels, and this need should be reflected in the Commission's requirements. Other suggestions would tie the provision of access services to an undertaking by the franchising authority, local educational authority or individual member of the public that such body will be responsible for programming one or more access channels.

30. Lastly, a majority of the parties directly referencing it, urged the adoption of a conglomerate headend approach to determining subscriber count. This approach, it is asserted, more totally reflects a system size and corresponds in general with measurement standards followed by the industry.

Resolution

31. The question of what criterion should be used in applying the access and channel capacity rules involves three component parts: a) should the rules apply on a headend or conglomerate rather than community-by-community basis; b) should certain types of systems in the major television markets that

are now subject to these rules be relieved of their obligations; and, c) should some systems outside of the major markets that are not now subject to the rules become subject to them.

32. We turn first to the question of whether we should discontinue our prior practice of requiring that separate access channels be provided to each community served—whether it is not sufficient for one set of channels and facilities to serve more than one community if the system is so constructed that one integrated cable plant serves more than one community. The basic problem is that community boundaries do not correspond to the technical and economic realities of cable television system construction. Technical and economic factors frequently dictate that one technically integrated cable television plant serve many communities. We have, in the process of considering numerous waiver requests involving the question of whether one set of channels could serve more than one community, come to recognize that the provision of access channels is more appropriately related to the realities of system construction than it is to community boundaries. We have, accordingly, determined to reflect this in the rules by applying the rules to integrated cable entities regardless of the number of community boundaries which they may cross. In our pending proceeding looking to fundamental changes in the definition of a cable system (see *Notice of Proposed Rulemaking in Docket 20561*, FCC 75-896, 54 FCC 2d 824 (1975), we indicated our intent to amend our rules to more nearly reflect the technical and economic demands of cable television system operation. While the action taken here is consistent with our proposals in that proceeding, it should be made clear that it is not our intent here to prejudge in any way the broader issues involved in that proceeding.

33. The second major question involving the applicability of these rules concerns whether it is appropriate that they apply to all systems [303] of whatever size that are located in the major television markets. We recognized in the *Notice* in this proceeding that there are systems in the major markets far too small to bear the burdens of providing access services. (See 53 FCC 2d 791-792.) In addition, the audiences viewing access programming on such systems may reasonably be expected to be so small that a federally imposed requirement would appear inappropriate. We accordingly have determined to exempt from our channel capacity and access channel obligations those systems that cannot in general reasonably be expected to have a need for, or be able to support, these services.

34. We have examined community size, penetration rates, and several measures of system profitability, as well as various combinations of these in attempting to determine what criterion should bring the rules into play. Based upon this examination we have determined to alter our channel capacity and access channel requirements to apply only to those systems which have 3,500 or more subscribers.[5]

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[5] The decision as to criteria for applying these rules is, of course, intimately related to the substantive nature of the

35. We have reached this conclusion for several reasons. While the development of a formula which in all cases accurately projects community need as well as system financial viability would be ideal, we have been unable to construct such a formula. The profitability of a cable television system depends on numerous, often interrelated, considerations—the adequacy of off-the-air television reception, the nature and amount of non-broadcast services provided, subscribers per mile of distribution plant, business acumen of the system operator, to name but a few. Similarly, while the need of a community for access services does, we believe, increase with community size, there are other factors including the availability of alternate media within the community which also affect such need. Some generalizations are, however, possible. A cable system's administrative, service and general expense charges are comparatively fixed cost items. The per subscriber costs imposed by these expense items falls more heavily on smaller systems which as a result are often less profitable. As subscriber count increases some economies of scale advantages are realized. These cost advantages become increasingly apparent as the system approaches the 3,500 subscriber level. At that level a system also usually employs several fulltime experienced staff

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requirements themselves. Although for the sake of convenience the applicability criteria are discussed here separately, the criteria were selected with due regard for the impact of the changed obligations which were briefly reviewed above and which are discussed in greater detail in subsequent sections of this document.

members, has gross revenues of at least a quarter of a million dollars (3,500 x $6.50/per month x 12 months=$295,750) and can, we believe, absorb the comparatively small additional expense involved in meeting our requirements. In addition, for a system to obtain 3,500 or more subscribers it must, in general, serve a community of 25,000 or more population.[6] A community of this size or larger may reasonably be presumed to have a need for expanded channel capacity and access services. This is particularly true if the community does not have sufficient alternate [304] sources of local electronic media to which its citizens can gain direct access. By setting our level at 3,500 subscribers we have acted to exempt smaller often less profitable systems from complying with our requirements and insured that larger communities will have the benefits associated with expanded channel capability and the provision of access services. At the same time, we have established a reasonable margin of insurance that the costs imposed on larger systems can be equitably distributed over a sufficient number of subscribers so as not to impose an undue burden on either the system operator or the public.

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[6] Generalizations respecting the relationship between community size and system size are, of course, imprecise. For the most part, however, if a system operates in a community of 25,000 and passes all homes within that community it may reasonably be expected to approach the 3,500 subscriber level mark. The equation is as follows: 25,000 ÷ 2.9 (U.S. Census Bureau est. of persons per home for 1975) × 40% (a reasonable saturation level) = 3,448 subscribers.

36. Several parties in opposing an option tied to subscriber count have argued that such an approach may lead to uncertainty, for the channel capacity of a system must be determined prior to its construction whereas the number of subscribers which a system will obtain cannot be determined until it has been in operation for a reasonable period of time. We do not believe that this is an insurmountable problem. Prior to bidding on a franchise or constructing a system most cable operators conduct marketing surveys either for their own revenue projections or in order to obtain outside financing. These surveys typically include projections of population growth of the franchise area, the number of homes passed each year, the availability of off-the-air television coverage as affecting penetration rates, etc. A key element in these surveys is the number of subscribers which the system can expect to attain in various years of operation. Should these projections indicate that a system might ultimately in fact reach the 3,500 subscriber mark, common sense will dictate that in constructing the system our requirements must be observed. Should there be isolated situations where an operator in good faith for whatever reason misjudges the size of his system we shall of course entertain waivers of our requirements.

37. In choosing 3,500 subscribers as the level upon which to base our requirements we have rejected the arguments of those who believe that a multitiered approach to the provision of access services is appropriate. While we continue to urge the provision of

access services by all systems we do not think that, based on the record before us, additional federally imposed requirements are at this time appropriate. The limited public interest benefits which might be derived from a multitiered approach are, we believe, more than balanced by a need to simplify our requirements and to avoid imposing additional economic burdens on system operators, cable subscribers, and the public.

38. Having determined that it is appropriate to exempt from the obligations of these rules those systems within the major television markets that have fewer than 3,500 subscribers, we next turn to the question of whether these requirements ought not also be applied to those 3,500 or more subscriber systems that are not located in the major television markets. We believe they should and are no longer persuaded that the applicability of these rules should depend on the market location of the system involved. While there are certain differences between the number of signals that are available in the major television markets and in other areas and while there may be some differences between the types of communities, we do not believe these are sufficient to rationally distinguish where the rules should apply. In fact, some of the differences, as for example, the paucity of television [305] programming that may be available in certain areas outside of the major markets, suggest that there may be a greater need for access services in these areas. It is important to remember that there are systems of very considerable size in these mar-

kets. As we noted in footnote 16 of the *Notice* in this proceeding:

> Of the top 25 operating cable television systems in the United States listed in *Cable Sourcebook 1974* and ranked according to number of subscribers, 13 systems serving 277,000 subscribers are either located outside of all television markets (6) or within a smaller television market (7).

In sum, we believe it appropriate to trigger the applicability of these rules by system size rather than by system location.

39. By changing the criterion for applying the rule, we have shifted the group subject to the rules so that only 3,500 subscriber systems must comply. Based on the data presently available to us it appears that, because the rules will now apply to all larger systems without regard to location, more than 50 percent of all cable subscribers will now be on systems providing the full range of the required access services. Between 700 and 800 systems or combinations of systems will be subject to our new rules. While our requirements will impose new burdens on some systems it is important to remember that all systems with more than 3,500 subscribers are already subject to the obligations imposed by Section 76.253 of the Rules. That rule provides that as of January 1, 1976, cable television systems with 3,500 or more subscribers must make available to the public, equipment for local production and presentation of cablecast programs and permit local non-operator production and presentation of such programs. Many of the reasons which led us to arrive at the 3,500 subscriber figure in that context are applicable to our decision herein.[7] Moreover, by adopting the same trigger for our access channel requirements and our facilities requirement we have acted to simplify our rules. By complying with our access rules in the past, a system in effect also complied with our facilities requirements, for the equipment which is required to comply with Section 76.253 is included in the equipment we mandate for the public access channel.[8] We

[7] By requiring that system operators provide equipment for the local production and presentation of cablecast programs and permitting local non-operator production and presentation of such programs, Section 76,253 has been in essence an access requirement. This section was previously set out from the rest of the Commission's access rules due to its history. Unlike the other access requirements, Section 76.253 has its origin in the Commission's former mandatory origination rule which required, in addition to facilities for public production of programming, that an operator with 3,500 or more subscribers engage in programming himself. (See former Sections 74.1111 and 76.201 of the Rules.) Although upheld in *United States* v. *Midwest, supra,* the mandatory origination requirement was subsequently eliminated from the rules based upon the Commission's belief that the availability of cablecasting equipment to the public is a more appropriate means to foster local programming than imposing mandatory programming requirements on system operators whose primary responsibility is to build and maintain their systems and who may not be motivated to produce quality programming of local interest.

[8] In specifying the type of equipment which a cable system with 3,500 or more subscribers must have we stated in paragraph 39 of the *Report and Order in Docket No. 19988,* FCC 74-1279, 49 FCC 2d 1090 (1974):

have determined, therefore, to delete both Section [306] 76.251 and 76.253 from our rules and merge the requirements contained in those sections in the rules we are adopting today. (See appendix.)

The One for One Rule

Introduction

40. We turn next to a consideration of those specific provisions of the rules on which we have sought and received comments. Although in our *Notice* we indicated that we were not considering changing the 20-channel capacity rule, some comments have suggested we do so. The difference in cost between constructing a system with the capacity for 12 channels and building a system with the capacity for 20 channels is small. We also observed that many systems, although not required to do so by our rules, are installing equipment capable of providing 20 or more channels. (See footnote 11, 53 FCC 2d at 790.) Nothing in the comments has caused us to alter our initial opinion. We continue to believe that retaining this

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. . . in order to comply with the rule, the operator must have at least the capacity to afford live programming with one or more black and white cameras, the capacity to video tape record remote programs, edit, and play them back, and the capacity to modulate the resulting video and audio production on a cable channel.

In footnote 12 of that document we stated:

As an example, a one-half inch portable video tape recorder with a camera and appropriate adaptors to connect to an editing/playback video tape deck and to a modulator would constitute a very basic requirement.

rule will aid in insuring the availability of capacity on cable television systems for future broadband communications uses.

41. We did, however, indicate our intent to review the need for Section 76.251(a)(2) of the rules. This section requires that a system subject to our channel capacity rules must maintain bandwidth capable of transmitting one non-broadcast channel for each broadcast channel used. As we observed in our June 3 *Notice*, this requirement has no effect upon any system which furnished its subscribers with ten or fewer broadcast signals because compliance with our 20 channel capacity rule will also satisfy the one-for-one requirement. However, for those systems which provide their subscribers with over ten broadcast signals, compliance with the one-for-one rule may pose a very significant burden by requiring the installation of a second cable or the construction of systems with extremely large amounts of non-broadcast bandwidth for which there is no reasonably foreseeable future need. For these reasons we raised for consideration in this proceeding the possibility of deleting the Section 76.251(a)(2) "one-for-one" requirement.

Comments

42. Comments provided with respect to this portion of our *Notice* have confirmed our initial judgment. The vast majority of parties who directly referenced this requirement in their comments urged its deletion. For example, the State of Minnesota Cable

Communications Board states that compliance with this requirement may unfairly require operators to rebuild their systems even if there is no use for the multiple non-broadcast services which could be provided. When applied to the three systems it owns in the San Francisco Bay area, Western Communications Inc. states that compliance with this requirement would necessitate the construction of a system with between 44 and 54 channel capacity, at an additional cost of between $2.1 and $4.6 million. Such cost, Western argues, may exceed its present $4.3 million investment in these three systems, and cannot be justified in terms of any evidence of future need. Various parties urged that we replace this requirement with a two-for-one rule; that is, for every two broadcast [307] signals carried, the system must maintain one channel for non-broadcast use. Such a requirement it is argued would more reasonably insure the future availability of capacity.

Resolution

43. In indicating the need for a reconsideration of this rule we stated:

> [W]e believe that by framing our channel capacity requirements to mirror the number of television channels which a system provides its subscribers we have created an artificial formula unrelated to the realistic needs of each community which may result in the imposition of unjustified costs to system operators and ultimately to the public (footnote omitted). 53 FCC 2d 782, 795.

The comments filed and our further consideration of this matter confirm our belief that this particular rule does not provide the most advantageous means of assuring adequate cable system channel capacity. Nor do we believe the problems inherent in relating channel capacity to broadcast signals carried can be remedied by changing the form of the rule so that only one non-broadcast channel must be provided for every two broadcast television channels carried. To the burdensome nature of this rule and the lack of any necessary relation between signals carried and the need for non-broadcast channel space we would add a practical problem with the rule which renders it counter-productive in some respects and impractical of application in others. This problem relates, once again, to the realities of system construction. Channel capacity is to some extent set once the system's distribution plant is installed. If the addition of a signal were to trigger a massive reconstruction requirement in order to comply with the one-for-one requirement this would, in the case of a signal whose carriage was voluntary, tend to discourage that signal's addition and, in the case of newly authorized stations whose carriage was mandatory, create great uncertainty at the time of initial construction as to what capacity would be eventually required. In view of these considerations and consistent with the belief that restrictions should be maintained only when there is reasonable evidence of their need, we have determined to eliminate this requirement.

Two-Way Requirement

Introduction

44. Our two-way requirement contained in Section 76.251(a)(3) [9] poses a more difficult problem. At present, systems affected by our channel capacity and access channel trigger must construct their distribution networks so as to provide the capacity for non-voice return communications. In setting for comment the appropriate approach [308] which we should take with respect to this rule, we indicated our tentative belief that compliance with this requirement has not been unreasonably burdensome at least for new systems. We also specifically requested data relating to the incremental costs imposed by this requirement and opinions as to whether compliance with this requirement does in fact tend to facilitate the provision of two-way services.

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[9] It should be recalled that the rule in its present form does not require that the cable system be operational in the return mode. Rather, as we stated in our *Notice* in this proceeding, it was an attempt:

> . . . to insure that new systems would be constructed so as to be capable of furnishing two-way services "without having to engage in timeconsuming and costly system rebuild," when and if a demand arises for such services. As a practical matter, this requirement necessitates the installation of certain passive equipment in the system's distribution network and the use of downstream amplifiers which possess minimum second order distortion characteristics. These amplifiers must also be contained in a "dual housing" unit capable of receiving a second amplifier for upstream use. The actual installation of this amplifier, however, is not required to comply with our rules. 53 FCC 2d 782, 793-794.

Comments

45. Most system operators and cable television interests as well as a few other parties favored the deletion of the two-way requirement. Urging its elimination, California Community Cablevision asserts that while the rule presently provides a burden to system operators, economically viable two-way operations are at least five years away. The Community Antenna Television Association asserts that compliance with this Commission requirement can increase construction costs from 10 percent to 140 percent. The Berkeley Community access center also urges the deletion of this requirement but its replacement by a local standard. Coldwater Cable Television in urging its elimination notes, however, that several experiments are presently underway in the State of Michigan including "an ambitious two-way study at Adrian . . . involving several schools, a resource center, two-way cable TV and expert instructors."

46. The Broadband Communications Section, Communications Division of The Electronic Industries Association, urges the retention of our two-way requirements, arguing that without such built-in capacity systems will tend to stifle or delay the provisions of bi-directional communications. This view is echoed in comments filed by Hendrix Corp. which also favors the adoption of limited operational two-way capability for digital data transmission on an experimental basis noting:

> We have no crystal ball capable of identifying which of the many proposed services or combina-

> tions thereof will succeed. We know, however, as practitioners of high-technology in a computer oriented industry, that the existence of and access to broadband bi-directional digital communications will be necessary when computer and cable technologies merge.

47. A majority of educational authorities also urged the retention of the Commission's two-way requirement. In support of retention of this requirement, the Joint Council on Educational Telecommunications asserts that the present requirement as interpreted leaves up to the system operator the choice of whether to inaugurate two-way services while its elimination would reduce the Commission's future options should two-way operations prove economically feasible. The National Association of Educational Broadcasters urges retention of the requirement, arguing that without such a requirement, systems would in the near future have to undergo lengthy and costly rebuild as "twc-way instructive uses continue to develop and assume increased significance in the educational process." Also urging the retention of the Commission's Rule, the City of Imperial Beach, California, asserts:

> Within the past several years cities such as Imperial Beach have begun joining together to provide government services and to increase governmental efficiency pursuant to intermunicipal cooperative agreements. Cities are sharing data processing and computer time. Cities are reducing capital and operating costs by cooperating in the provision of fire and police services. As this

> trend continues to develop it [309] is reasonable to expect that cities will utilize the two-way capacity of cable systems in a way that will both reduce the cost of government and be of economic benefit to the system.

Finally, in favoring a partial retention of the two-way rule, various staff members of the Cable Television Information Center have provided a study of the costs entailed in compliance with this rule. This study indicates that while the incremental cost of compliance with our two-way requirement is in the order of $200-$300 per strand mile for new systems or systems which have to reconstruct to meet our 20 channel capacity requirement, the cost, $1500, to reconstruct to provide two-way capacity for a system otherwise in compliance with our requirements is substantially higher. In addition, CTIC provided cost estimates to convert our capacity requirement to the theoretical capacity to provide two-way service, absent terminal charges. These estimates are in the order of $700-$2000 per strand mile.

Resolution

48. In attempting to resolve the question of whether to retain, delete or in some fashion modify the two-way capacity requirement we are faced with several distinct, interrelated and competing considerations. Initially, as with the channel capacity requirements generally, there seems to be no necessary relationship between a system's location, within or outside of the major television markets, and the need for

a two-way requirement. And it is also apparent that without a sufficient subscriber base upon which to distribute fixed costs, smaller cable systems will not be in a position to support two-way cable operations of the type our existing requirements is intended to foster. Thus, some adjustment in the applicability of these rules would appear to be in order.

49. A second consideration involves the relatively untried nature of those two-way services which may be provided by cable. The theoretical problems of how to conduct two-way cable operations seem well on the way to solution, but practical problems, both technical and economical, remain. While a number of experiments with two-way cable operations are in progress, practical commercial two-way services are not yet in general operation, and developments in this area have been far slower than was anticipated at the time the requirement was first adopted. In view of this, we cannot say with complete assurance that these services will ever be fully developed, that facilities constructed in anticipation of their development will wholly correspond to the facilities needed after all technical questions are resolved, or that some of the projected services will not turn out to be more efficiently accomplished by using existing telephone circuits or other communications systems.

50. On the other hand, the public benefits of many of the predicted two-way cable service are substantial and worth some considerable effort to facilitate. Moreover, the obstacles faced by these services may be almost insurmountable if the necessary capacity is not

generally installed on cable systems as they are constructed. There is a very real entrepreneurial "chicken-and-egg" problem which has to be overcome for two-way services to develop. If systems generally do not [310] have the capacity to provide these services, then there is little incentive to develop the services. And if the services are not developed, then there is little incentive to install the capacity. Moreover, it seems likely that many of these services will not be economically efficient until economies of scale bring subscriber terminal, headend communications processing equipment, and software costs to some reasonable level. All of this is compounded significantly by a second problem. As the comments make clear, the failure to install two-way capacity at the time of initial construction or at a major reconstruction, undertaken for other reasons, creates very substantial barriers to the later introduction of the capacity. While the costs of adding this capacity initially are modest, it costs almost seven times as much to add the capacity at a later date.

51. A careful review of these considerations with particular emphasis on the modest costs involved in constructing with two-way capacity, the substantial obstacles failure to install this capacity throws in the way of the development of two-way services, and the very substantial public benefits that such services may offer, have persuaded us that there is a need to retain our limited requirement in this area. We believe a continued two-way capacity requirement for those larger (3,500 subscriber) systems commencing

construction in the major markets and the expansion of this requirement to larger systems outside of the major markets will materially advance the day when two-way services are generally implemented. For those smaller systems in the major markets and for those which, under prior rules, would have been required to reconstruct to provide this capacity, we believe the requirement is unduly burdensome and we have accordingly deleted its application to these systems. Those systems with 3,500 or more subscribers that formerly would have had, by March 1977, to reconstruct to provide this capacity will now only be required to provide the capacity when they are otherwise undergoing reconstruction to comply with our channel capacity rules.[10]

52. In taking this action we are mindful of the recent decision of the United States Court of Appeals for the District of Columbia in *NARUC* v. *FCC*, Case No. 75-1075, decided February 10, 1976. At issue in that proceeding was the Commission's authority to preempt state regulation of cable system leased access channels for intra-state, two-way, point-to-point non-video communications. The Court held that the Commission, in attempting to preempt state regu-

[10] That is, a system in full compliance with the 20 channel capacity rule is under no obligation to reconstruct to provide two-way capacity. However, a system required to reconstruct to provide 20-channel capacity will also be required to add two-way capacity as part of that reconstruction. As existing 20-channel systems naturally rebuild it is also contemplated, although not required, that they may take this opportunity to add two-way capacity.

lation of this area, had exceeded its authority. Consistent with this decision we are amending the rules to make it clear that we no longer regard the regulation of these services at the state or local level to be preempted by our regulations. The point decided was, however, a narrow one which, we believe, ought not foreclose our continued authority to require that cable systems construct with the capacity to provide two-way services. Some of the important services which two-way capacity makes possible, such as operational monitoring of the system's functioning, are so clearly related to the distribution of broadcast program- [311] ming as to bring our capacity requirement within the holding of that case.

Dedicated Access Channel Requirements and Composite Access

Introduction

53. Pursuant to Section 76.251 of the Commission's Rules old major market systems have been required not only to reconstruct and provide capacity for 20 channels and two-way by 1977; they were also required once reconstruction was completed to dedicate four separate access channels: one free public channel, one educational and one governmental channel each free of charge to the users for five years after completion of the system's basic trunk line, and one leased channel of a type which could be received by subscribers generally. New major market systems have been required to meet these requirements from the date that operations were commenced.

54. The dedication of these four access channels requires, in the majority of cases, that a system with 20 channel capacity install a converter [11] in each subscriber's home. By installing a converter in each subscriber's home, a system with 20 channel capacity can in fact deliver 20 or more channels of programming to that home. Without installing a converter such systems can at best deliver only 12 channels of programming. Accordingly, the installation of a converter was required to meet the four dedicated access channel requirement if a system as a practical matter provided its subscribers with 9 or more broadcast signals (i.e., 9+4>12).[12] See *Clarification of the Rules and Notice of Proposed Rulemaking*, FCC 74-384, 46 FCC 2d 175, para. 20 (1974).

55. In our June 3, 1975 *Notice* we indicated our intent to proceed on an *ad hoc* basis to waive our requirement to install converters based upon a showing that compliance with this requirement was un-

[11] A converter is a device that changes non-standard frequency channels (e.g., ones above 216 MHz) to standard VHF channels enabling such channels to be tuned directly to the television set. The installation of a converter can also be used to diminish interference from strong over-the-air signals.

[12] Generalizations about usable channel space are in actuality imprecise in view of the reduction in usable channel space caused by a number of factors including co-channel interference from strong over-the-air signals. Because the number of usable channels is reduced by these factors many systems providing 8 or fewer channels would also have to install a converter in order to have sufficient activated capability to provide 4 channels for access use.

reasonably burdensome.[13] In addition we proposed to maintain our commitment to access services by requiring all systems ultimately affected by our access channel criteria to make available existing portions of their bandwidth for composite access purposes regardless of the approach which we ultimately took to rebuilding or installing converters.

Comments

56. Many parties specifically addressing the question of what action should be required to make these dedicated channels available, urged [312] that the costs of adding converters or rebuilding system plant were so substantial as to far outweigh whatever public benefits there might be in maintaining the multiple dedicated channel concept. This was particularly urged to be the case in situations where it was alleged that existing activated capability already offered for access uses remained unused over long periods of time. Many system operators pointed to the expense involved in installing converters in each subscriber's

[13] In delineating the type of sharing we would require we stated:

> We would envision entertaining requests to waive our converter requirement only in the case of smaller systems whose projected revenues and subscriber potential are such that the imposition of this requirement would appear to be demonstrably burdensome. These systems should also be prepared to demonstrate that there is no present nor reasonably forseeable future demand for the channels to be added and that should such a demand arise, converters would be installed within a reasonable period of time.

home.[14] For example, Central California Communications Corporation and Cable-Com General state that the installation of converters doubles the cost of system rebuild. Storer Broadcasting Company indicates that a rate increase of $1.75 to $2.00 per month would be necessary merely to cover the costs of installing converters on its systems. Viacom International Inc. notes the following:

> The average converter presently costs approximately $40. Installation and fittings bring this figure to approximately $50. If this converter is depreciated over a four year period, it will cost approximately one dollar per month to furnish each subscriber with a converter. Since this is eventually passed on to the subscriber, the subscriber who now pays for example $5.50 per month for basic cable service will pay an additional 18 percent of his present charge for access channels he may not want. These costs do not consider converter maintenance, loss of devices, and financing costs for the units. . . . This increase in the subscriber rate will lead to the loss of subscribers and inevitably an even higher rate.

57. Many parties including various cities and public interest groups urged the provision of composite access services rather than the installation of a converter if such is necessary to provide the four separate access channels required by the rules. Gill Cable

[14] In our June 3rd *Notice* we estimated that the cost of installing a converter in each subscriber's home is between $25-40 per subscriber, exclusive of labor.

notes that while it is presently programming over 100 hours a week on its system's public access channel in San Jose and Campbell, California that viewership identification will be enhanced if systems are permitted to provide all access programming on one channel rather than the designation of multiple separate access channels. The City of Eugene, Oregon, in a similar vein notes that public agencies are reluctant to invest the significant amounts of money necessary to utilize separate designated access channels at this stage of cable's development. "Programming a composite channel would require less investment for each participating agency and would give viewers more reason to turn to that channel since it would be more consistently utilized. . . . It is more realistic to initially require a composite access channel . . . to encourage the desired use of cable and allow for expansion with need. At the same time, it is important that stimulus for expansion be provided." Other parties argued that the Commission should never require the installation of a converter solely to provide access services; or that cable operators should be permitted to assess a direct charge on those subscribers who wish a converter to view access programming. Lastly, several parties point to the results of various studies on access channel use and viewership conducted either by themselves or independent organizations[15]

[15] See, e.g., Bretz, R., *Public Access Cable TV: Audiences*, Journal of Communications, Summer 1975 at 15. Doty, P., *Public Access Cable TV: Who Cares*, Journal of Communications, Summer 1975 at 33. Johnson, R. C. and Agostino, D.,

which they allege demonstrate that there is very little present demand [313] for the provision of four access channels and our rules should be modified accordingly.

Resolution

58. This is a difficult area. It is clear that cable systems generally could, from a technical point of view, be reconstructed or otherwise modified to provide the four dedicated access channels now required of major market systems. The question, however, is whether the public benefits of having these multiple dedicated channels outweigh the costs that may be incurred in order to provide them. If it is concluded that the requirements in their present form are unduly burdensome we need then consider what lesser obligations might nevertheless be appropriate.

59. There seems no dispute that the costs to provide these channels are frequently very substantial. To comply, some systems would have not only to replace all of their trunk and distribution cable and amplifiers, but also install converters. Just looking at the converter cost alone, a 3,500 subscriber system would have to invest, at $40 per converter, at least $140,000, or more to meet this requirement.[16] The

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The Columbus Video Access Center: A Research Evaluation of Audience and Public Attitudes, Institute for Communication Research, Indiana University, 1974.

[16] This is an overly simplified calculation because, among other things, systems using converters frequently need not only one converter for each subscriber but a substantial inventory of spare converters to replace those broken, lost, or stolen.

installation of a converter is one of the single most costly items involved in cable system reconstruction. It is also clear that there is an equivalent burden placed on new systems which may, pursuant to our rules, have to acquire the additional capital to provide converters prior to the commencement of operations and the generation of any revenues. Compliance with this requirement may very well therefore have had the undesirable effect of retarding new system growth and expansion of access services generally.

60. While the requirement poses an equivalent burden for both new and old systems it also equally affects large and small. The per subscriber cost of compliance with this requirement, unlike other portions of our access and facilities requirements does not significantly diminish with system size. Whether a system operator has 500 subscribers or 5,000 he still must pay, exclusive of labor charges, at least $25-40 per subscriber if he wishes to install converters.

61. Upon further examination of this area we think that the burden we have required system operators to meet is unreasonable and that our requirement to rebuild or to install converters if such is necessary to provide four dedicated access channels should be eliminated. By retaining and expanding our 20 channel capacity and two-way requirements for larger systems we insure that larger new systems and those being rebuilt will provide capacity which will facilitate the provision of access and broadband

services in the future. By mandating the installation of converters we have required present excess capability at a substantial cost not only to the subscriber who must ultimately pay for the installation of that device whether or not he wishes to view the programming being provided but also to the citizen in the community where the benefits of new cable service will not be realized because the funds available in the marketplace have been diverted as a result of our requirements.

[314] 62. Based upon the comments filed in this proceeding as well as those filed in Docket 20363 and our experience generally, while it would appear that the use of access channel is growing, in the vast majority of communities presently providing multiple channels for access use, these channels are at best sporadically programmed. Rather than requiring the separate dedication of access channels for different uses which necessitates the installation of converters, we believe that our goals for access cable casting will be furthered by allowing the provision of access services on one or more channels which may be shared among different access users. The provision of access services on a shared or composite basis will, we believe, foster the success of access efforts by enhancing viewer identification with a channel which is more fully programmed, rather than dispersing individual access efforts among several channels which are not. Several of the parties filing comments in this proceeding have recommended such an approach, and it is in

fact consistent with our prior observations. See paragraphs 14 and 15 of the *Clarification, supra.*

63. Many systems without installing converters have one or more channels available to provide access services. A review of data submitted to the Commission indicates that cable systems throughout the country provide their subscribers with an average of approximately 9 broadcast signals, thus leaving up to three channels for potential access use. Many systems which do not possess a full channel can provide access programming on the "black out time" which occurs as a result of compliance with out exclusivity and nonduplication requirements. We think that the provision of access services under these circumstances for systems with limited activated channel capability will be sufficient to meet most present access channel needs.

64. We have, accordingly, modified our rules in several major respects. First, while we shall maintain our commitment to the provision of four specially designated access channels we have modified this requirement to make clear that (a) it will only apply to those systems with 3,500 or more subscribers which have sufficient channel capability, without installing converters, to provide such multiple channels, and (b) each specially designated channel need only be provided when there is a demand for such channel's full time use. Second, in view of our belief that in the majority of cases, all access needs can be met by the provision of one access channel for composite access programming, we have determined to modify

our rules to require that cable television systems with 3,500 or more subscribers provide at least one designated access channel for shared use among public, educational, local government and leased users, if such a system's activated channel capability is sufficient to provide such channel.[17] For those systems [315] which do not have sufficient activated capability to provide even one full channel, the designation of "black out time" will be required, though it is a less desirable alternative.[18] Consistent with this approach,

[17] Pursuant to Section 76.253 old major market systems with 3,500 subscribers which did not have to comply with the provisions of Section 76.251 until March 31, 1977 as well as all those systems with 3,500 or more subscribers located outside of the major markets were required to make at least a reasonable effort to provide channel time for the local non-operator presentation of cablecast programs. We intend to initially maintain that policy and not require such systems to dedicate a separate channel for access use until March 31, 1977. As of that date, however, such systems will be required to dedicate one access channel for composite access programming provided their activated capability permits them to do so. Such systems will also not be required until such date to provide five minutes free production time for public access use or studio facilities. By retaining this one year leeway we seek to avoid any inequity caused by our decision to merge the requirements formerly contained in Sections 76.253 and 76.251. As of March 31, 1977 all systems with 3,500 or more subscribers will be required to comply with our access rules uniformly.

[18] The selection of "black out time" to fulfill the system operator's access responsibilities is less than an optimal approach. Black out time occurs on different channels at different times depending upon various factors including the scheduling practices of the local television station licensee. Neither predictability of time nor channel is fostered under

we do not envision certificating new systems or the addition of new signals whose carriage is not mandatory to existing systems, if the activated channel capability available for the provision of access services is insufficient to provide at least one full channel for access programming. We have also amended our channel expansion formula to make clear that it does not require the dedication of channels beyond the systems' activated capability. (See Section 76.254.) In no case will the use of this formula therefore require the installation of a converter in each subscriber's home. In addition, we have modified our rules to make clear that at all times when any of the access channels are not in use, such channels may be used for other broadcast and nonbroadcast purposes, provided such use is consistent with other provisions of our rules. (See Section 76.254(b).)

65. In determining a system's activated channel capacity available for the provision of access services we shall look first to the number of usable channels actually provided to each subscriber's home. A channel which cannot be programmed due to co-

these circumstances. In general, however, much of the black out time which occurs as a result of our network nonduplication requirements occurs during the hours of 1-4 in the afternoon and during "prime time" in the evening. An operator might wish to give priority to educational access use during this afternoon period while reserving the evening for other access programming. The establishment of such reasonable classes and the allocation of separate times to them in a system operator's access channel rules would be entirely consistent with the objectives of the revised rules.

channel interference, for example, is of course not a usable channel. A channel which could be provided to each subscriber's home merely by installing a modulator, at a cost of $800-$1200, and making some comparatively inexpensive modifications to the system's headend is deemed a channel provided to each subscriber's home for purposes of the application of this requirement. In determining the number of channels available for access programming we have specifically excluded those channels already programmed by the system operator for which a separate charge is made. Those channels are most frequently used to provide pay entertainment programming to only those subscribers who desire such programming and are willing to pay an extra charge for it. We do not include these channels as available for the provision of access services in view of the costs which have been incurred by the system in purchasing and installing "traps" and otherwise providing this service as well as the benefits to subscribers in terms of increased diversity of viewing choices derived therefrom. From the total number of usable channels provided to each subscriber, those channels used to provide traditional cable television service, i.e., channels providing television broadcast signals, are subtracted. We are left with activated channel capability available for the provision of access services. These channels include channels provided the subscriber but not programmed as well as those providing other non-broadcast programming, i.e., automated program- [316] ming, orig-

ination channels, etc. for which a separate assessment is not made.[19]

66. By requiring the expansion of access channels only up to the limitations of the system's activated capability, we desire to foster the provision of access services without imposing converter costs on all subscribers, some of whom may be uninterested in viewing the access programming provided. Consistent with this approach our rules may not be construed as permitting a system operator to exclude a potential access user who intends to use a channel, install converters himself, and pass such costs along to those who wish to view the additional programming provided thereby.[20] Where leased channels are involved,

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[19] It is our intention that every reasonable effort be made to accommodate the various competing channel uses. It is not our intention that established cablecast services provided by system operators be automatically displaced. While we generally believe that automated services such as time and weather channels should give way to access uses, if other irreconcilable conflicts between channel uses develop, we are prepared to consider each such situation individually on its merits. We recognize that many of the services provided on these channels, such as community information, consumer price lists, etc., clearly provide a substantial benefit to subscribers.

[20] We note for example that even systems possessing "12 channel capacity" amplifiers can often obtain an additional channel or channels by installing a converter and programming on the "mid-band." Should a potential educational, governmental or leased channel user desire to program this channel and pass the costs of converters on to those who desire to view whatever service is provided, we shall require the system operator to permit him to do so.

charges may be assessed for channel time, provided they are not designed to prohibit entry. See *Clarification, supra*, at paragraph 34.

67. We expect the operator in general to administer all access channels on a first come, first served non-discriminatory basis. We recognize that some of the potential educational, governmental, as well as leased channel uses may not by their very nature permit the shared use of the channel provided, e.g. classroom educational access programming, the interconnection of governmental agencies, etc. To the extent that this is the case we shall expect the operator to make additional channels available for the provision of other access uses up to the limit of his activated capability. In administering the access channels provided we shall rely on the good faith of the operator to meet his access obligations.

68. There are, however, certain actions which we shall consider as evidence of bad faith on the part of system operators in meeting their access obligations. We do not consider as acting in good faith an operator with a system of limited activated channel capability who attempts to displace existing access uses with his own origination efforts. While we shall continue to encourage operators to originate, we do not believe that the public interest will be served if such efforts are at the expense of others who wish to provide access programming. We shall scrutinize the actions of operators who, while providing their own programming, assert that their activated capacity is insufficient to permit the leasing of a channel to

potential competitors. Should the need arise we shall take whatever action is appropriate to prevent system operators from using their control over their system to exclude the presentation or alternate sources of programming. (See Section 76.254(c).)

69. A closely related matter concerns the presentation of pay entertainment programming. We have sought to encourage the presentation of such programming for it provides diversity of viewing choices to the public. We do not, however, believe that the public interest will be [317] served if this programming is provided at the expense of local access efforts which are displaced. Should a system operator for example have only one complete channel available to provide access services we shall consider it as clear evidence of bad faith in complying with his access obligations if such operator decides to use that channel to provide pay programming. Should it appear that the growth of pay services is in fact substantially infringing on the public's ability to obtain access on cable television systems we shall promptly revisit this area and take whatever action is appropriate to prevent such an occurence.

70. As a result of our decision to merge our access rules and facilities requirements and to allow the provision of composite access services in many cases rather than separately dedicating different access channels, our rules have been modified in several additional ways. Consistent with our previous actions respecting our facilities requirement, we shall expect system operators to identify the type of service being

presented on the composite channel (i.e. origination cablecasting, access cablecasting, or inclusion of television station identification) and the person or group presenting the program. Whether other provisions of the rules, e.g., equal time, fairness, sponsorship identification, and advertising are applicable, will continue to depend upon which type of cablecasting is being provided. (See e.g., Sections 76.205, 209, 213 and 215.) In the case of access programming we shall continue to require compliance with the applicable regulations concerning program content control, assessment of costs and operating rules. See Sections 76.256(b), (c) and (d).

71. A related matter concerns the provision of a studio. At least a minimal studio has been required in order to comply with our access requirements whereas our facilities [sic] equipment "although requiring the capacity to provide live programming," has been silent on this matter. In delineating the type of studio required to meet our present rules, we have been liberal. A system may choose to designate one room on a full-time basis as its studio. Alternately, should sufficient space not be available, it may choose to designate part of a room on perhaps a part-time basis as its studio. In merging our two requirements we shall continue this approach. So long as there exists some inhouse capacity for members of the public to record programming, we shall consider our studio requirement satisfied for all systems with more than 3,500 subscribers.

72. We have also determined to modify our prior requirement for the five year free availability of the government and educational access channels. Instead of running from the date of completion of the system's basic trunk line, the five years shall be triggered from the date the system first offers channel time to such entities for cablecasting. Our intent in adopting our original requirement was to allow a five year experimental period for the free provision of the government and educational access channels. As a practical matter, however, such provision was not in fact required by our rules for many older systems until March 31, 1977. In many cases, this date was more than 5 years after such systems' trunk lines were completed. Our intent remains the same under the new rules and we have modified them in an effort to insure that some reasonable period of experimentation will in fact occur in all cases.

[318] 73. Several additional editorial changes have also been made that are designed to implement prior policy statements or clear up misunderstandings under the prior rules. Our leased channel rule has been modified to specify, for those systems which possess sufficient activated capability to provide four access channels, the provision of a full channel for leased use. This is in accord with our prior policy. (See *Clarification*, *supra*, at para. 20.) We have also modified our channel activation requirement now contained in Section 76.254(c) to specify that the time trigger employed (channel use for 80 perent of the time during any consecutive three hour period for six con-

secutive weeks) applies to each channel individually. (See *Clarification*, *supra*, at para. 21.) Lastly, we have added equipment and personnel costs to the section specifying what charges can and cannot be made for the provision of access services. (See Section 76.256(c)(3). Our prior rule merely specified "production cost" and it was our intent to include equipment and personnel costs within such cost. By specifying equipment and personnel costs in the rules we adopt today we have attempted to clarify our prior policy.

74. Once older systems are rebuilt to provide expanded channel capacity and converters are installed as a result of the individual business judgment of system operators many of the problems presently encountered in this area will disappear. Until that time the administration of the composite access channel approach will undoubtly present many difficulties. We shall, after some experience with these new rules has been gathered, issue a primer on various matters respecting our access channel obligations by which we hope to further clarify our position on these matters. We shall also administer our approach in a flexible manner and shall not hesitate to revisit this entire area should our experience dictate that our public interest goals are not being met.

Alternatives to the March 31, 1977 Rebuild Date for Old Systems

Introduction

75. Having determined which systems must comply with our access and channel capacity requirements and eliminated or modified some of these re-

quirements, we focus now on how and when to require compliance on the part of old systems which would have to reconstruct to meet our channel capacity rules.

76. In lieu of the imposition of the March 31, 1977 reconstruction deadline for old systems, we sought comment upon the possible elimination of the channel capacity and access channel requirements for old systems and their replacement by a rule requiring such service only upon demand within the individual community. Alternatively, comment was sought upon either postponing rebuild beyond March 31, 1977 to a distant date certain or postponing compliance until each cable system individually undergoes "natural rebuild." We shall summarize the comments directed to each of these options in turn.

Comments

77. *Elimination.* Many cable television interests urged the elimination of the present mandatory requirements and the provision of access services, if at all, only upon documented demand for such services within the individual community. The National Cable Televi- [319] sion Association argues that when the costs of compliance are measured against the supposed public interest benefits to be derived, the rules cannot be justified. It argues that public demand for such services as well as the revenue to be derived therefrom are negligible, and rate increases to finance technologically unnecessary rebuild are impossible to obtain. The Community Antenna Television Association and

Midwest Video favor the elimination of the Commission's rebuild requirements, arguing that their imposition is beyond the Commission's jurisdiction and constitutes government taking without due process in violation of the Fifth Amendment to the Constitution. Other parties argue that these requirements create substantial barriers to entry thereby slowing the expansion of cable service to the public in general.

78. Not all parties favoring the elimination of the present requirements were system operators. Various parties urged the Commission to permit states or local authorities to set rebuild obligations which it is argued could more easily be tailored to the individual needs of communities. For example, in supporting the Commission's decision to cancel the March 31, 1977 deadline, the Cable Television Committee of the City of Berkeley favored complete elimination of federal requirements and their replacement by local standards. The proposal that the Commission adopt a more restricted role and that federal rules be replaced by local requirements is mirrored in comments filed by Publicable, various members of the Cable Television Information Center of the Urban Institute and the Virginia Public Telecommunications Council, the lattermost urging an increased state role.

79. Other parties favored the retention or expansion of the Commission's requirements. Metromedia opposed all changes in the Commission's rebuild standards. Florida CATV urged a total federal preemption of access and rebuild matters. The National Black Media Coalition urged the maintenance of fed-

eral standards stating that "access channels for educational use are too important to be left to the vagaries of local franchising."

80. Those in opposition to any elimination of the Commission's rebuild requirement advance many different arguments. The United Church of Christ asserts that such action "would betray the expectations of hundreds of local franchising authorities, thousands of actual or potential users of access channels and literally millions of subscribers who have embraced CATV during the past three years relying on the Commission's . . . regulatory program." Opposing a trigger based upon demand, the Leon County Public Library asserts that difficulties in defining what constitutes demand would render the use of this criterion "grossly ineffective and in neglect of the public interest." Favoring a retention of our channel capacity requirements Broadband Communications, Inc., argues that a system not having additional channels available "can reasonably be expected to stifle or delay possible promising new applications of cable." Citing its efforts to provide 25 cable systems with its production of "A Time for Art," the Cable Arts Foundation opposes the elimination of the Commission's channel capacity and rebuild requirements. In a similar vein various educational authorities in the County of San Diego note that during the 1974-1975 school year 1736 hours of instructional programming were furnished [320] over the cable systems in the county and over 1/4 million dollars has been spent by

the school systems in developing the possibilities for educational access programming.

81. *Postponement.* Some parties urge that postponing the deadline for system reconstruction merely postpones the problem of compliance rather than resolving it. Other parties including the United Church of Christ, the New Jersey Coalition for Fair Broadcasting, the United States Catholic Conference, the National Association of Educational Broadcasters and the American Broadcasting Company urge that if postponement is necessary the Commission should postpone the deadline for no more than two to five years. In support of this view various educational authorities and public interest organizations point to the work and substantial expenditures which have been undertaken in their communities in preparing to use the access channels to be made available in 1977. Other parties, particularly various members of the San Diego school system, urge that any postponement of the Commission's requirements should be granted only on a case-by-case basis and then only to a date certain.

82. Opposing such an approach the Central California Communications Corporation argues that postponement to a date certain would merely repeat the Commission's prior mistake of selecting an arbitrary deadline and would involve the Commission in new projections which, it alleges, are bound to be as inaccurate as those made in the past. Also opposing any substantial postponement but for different reasons the Indiana Public Interest Research Group notes

that some cable systems pledged to local authorities to rebuild by 1977 and in reliance on these promises were granted rate increases by local governments to cover the costs of this reconstruction.

83. *Natural Rebuild.* Another option posed by our June 3rd *Notice* was to require compliance with our channel capacity requirements at such time as each individual system is rebuilt as a result of its natural obsolescence or because of necessary channel expansion to accommodate new services. Parties responding to our inquiry were urged to provide a definition of natural rebuild as well as their suggestions as to how such a requirement might be enforced.

84. A majority of the parties responding to our *Notice* favored the adoption of an approach tied to natural rebuild but disagreed on the means by which this approach could be implemented and enforced. A view shared by the Cable Arts Foundation, various members of the San Diego school system, as well as other parties would permit individual cable operators to postpone compliance until natural rebuild only if a specific construction schedule is provided to the Commission. Many of these parties also urge the Commission to require system operators to obtain comments of the franchising authority upon the adequacy of the reconstruction plan, and to require firm commitments on the part of system operators as to the date when reconstruction will be completed.

85. A different view is expressed by a group of 21 system operators and the Florida CATV Association. These parties, while favoring an approach tied to

natural rebuild, assert that no fixed date by which rebuild must be completed would be appropriate. In support of this view it is noted that while the average useful life of the component [321] parts which make up a cable system is between 10 and 15 years, the life cannot be uniformly calculated. These parties assert that "cable companies anticipate that an industry wide rebuild will occur naturally during the next 10-15 years." Rather than setting a uniform date many of these parties urge that monitoring to insure compliance with the Commission's technical standards will insure that technologically obsolete systems will be rebuilt.

86. Urging the adoption of an approach tied to natural rebuild, various members of the staff of the Cable Television Information Center of the Urban Institute suggest that compliance with our rules should be required within ten years of the date of any Commission decision to require rebuild for systems not previously on notice of our requirements. This ten year period it is argued "exceeds the customary equipment lifetime expectation used in the financial planning at the time of its installation." Comments filed by The American Civil Liberties Union also imply that the useful life of most equipment is between 8-10 years. A practical example of natural rebuild is also provided by Coldwater Cable Television which notes that it is in the process of upgrading its 12-channel capacity system to provide 30 to 35 channels and that at the present rate of expansion such rebuilding should be completed by 1980, e.g., 12 years after its initial amplifiers were installed.

87. Other parties assert that the adoption of an approach tied to the replacement of obsolescent parts is administratively unenforceable. An alternative suggested by several parties would be to link a system's rebuild requirement to the inauguration of pay entertainment programming on a cable system.

88. *Resolution.* Having reviewed the comments filed in response to this section of the *Notice* we have determined to adopt an approach which we believe combines the best aspects of natural rebuild and postponement to a date certain. Accordingly, we have determined to require systems with 3,500 or more subscribers to reconstruct and comply with our requirements within ten years. We have chosen this period because we believe that it corresponds to the time within which the vast majority of systems will, even absent our requirements, have completed natural rebuild.

89. In arriving at this result we have rejected the arguments of those who favor the complete elimination of our rebuild requirements. Our reasons for rejecting this approach are essentially the same as those which caused us to reject the arguments of those who opposed any channel capacity or access channel obligations whatsoever. We are mandated to encourage the larger and more effective use of radio in the public interest. Cable television with its potential to provide many channels of programming is an ideal medium to provide additional telecommunications services to the public. We would be derelict in our responsibilities to the public were we to sit by and do

nothing to insure that the expanded channel capability provided by cable television serves valid public interest objectives. Were we at this stage of cable's evolution to leave the provision of channel capacity and access services entirely to the marketplace, such action could have the practical effect of providing a barrier to the growth of access services as well as a disincentive to the furnishing of new services which we expect of [322] cable. We agree with the comments of those who assert that unless the cable operator has existing built-in capacity to provide access services, he may reasonably be expected to frustrate their provision. By requiring larger system operators to reconstruct and comply with our channel capacity requirements we hope also to foster the provision of such services in those communities which are served by old systems.

90. In promoting the beneficial uses of cable we recognize, however, an obligation to temper our expectations for the future with a realization of the economic realities of the present. We must insure that in formulating policies designed to facilitate the future provision of services, we do not create unreasonable barriers to the present expansion of cable in general. In setting for comment an option which would require old systems to meet our requirements upon natural rebuild we hoped to minimize the present cost to the cable system operator and the public while insuring that when reconstruction naturally occurred it would be accomplished in such a manner as to provide expanded capacity which would facilitate the provision of future services.

91. In our June 3 *Notice* we specifically requested parties to provide a definition of how natural rebuild might be defined and such a requirement enforced. Unfortunately the comments responding to this portion of our inquiry contained a paucity of suggestions or proposals by which we might define and enforce this concept. In addition, upon independent analysis we have been unable to formulate such a definition which while providing the requisite degree of certainty to cable operators of their obligations would not be unduly complex and administratively impossible to enforce. Systems vary in age, type and useful life of equipment as well as profitability. No one approach can take into account all these variables.[21]

92. Some parties have suggested that we in effect permit cable operators to define when natural rebuild will occur and pledge either to us or to local franchising authorities that upon completion of rebuild the expanded services required by our rules would be provided. We have closely considered this proposal but do not believe that its adoption would be appropriate. In order to administer such a provision equitably, guidelines or standards defining natural obsolescence would have to be established. Without such guidelines many franchising authorities might have insufficient resources to make informed judgment as to an equitable period for requiring rebuild,

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[21] For a discussion of the problems encountered in system reconstruction see paras. 6-10 of *Notice of Proposed Rulemaking in Docket 20508, supra.*

and a few cable operators might artificially retard rebuild in order to postpone the provision of expanded services required by our rules. The same difficulties encountered in formulating a definition of natural rebuild are encountered in attempting to establish these guidelines.

93. Some generalizations may however be made. The amplifiers and cable used to provide cable television service do have a limited useful life expectancy. The estimates provided in the comments indicate that amplifiers installed on old cable systems must in general be replaced sometime between 8 and 15 years after their initial installation. In general, these projections are in accord with our own estimates. Until the middle 1960's the amplifiers used in cable television systems employed vacuum tubes. These earlier amplifiers had in general a very [323] limited useful life span. In the mid 1960's up until approximately 1969-1970, the first generation of solid state single ended 12-channel capacity amplifiers were introduced. With the initial introduction of solid state components various problems were encountered, e.g., inadequate surge protection and accumulative heat. Though some of these amplifiers may last much longer, these problems, in general, necessitate the replacement of most first generation solid state components by the tenth to twelfth year after initial installation. With the refinements in technology which occurred in the very late 1960's and early 1970's push pull amplifiers were introduced which provide 20+ channel capacity by permitting the carriage of

midband and frequently super band channels. These amplifiers have, in general, a substantially longer useful life span.

94. Because the vast majority of systems constructed prior to 1972 were constructed with either vacuum tubes or single ended amplifiers with limited useful technological lives we would expect that many of these either have been replaced, or will be replaced, in the near future. Based upon the comments and our experience, we think that in the vast majority of situations a complete turnover of this older equipment will be accomplished naturally within ten years. Accordingly, we have determined to use this ten year standard in our rules. Those systems regardless of market location which have 3,500 or more subscribers shall be required to reconstruct their plant and distribution network in order to comply with our access and channel capacity requirements and to complete such reconstruction within ten years of the date of this decision.

95. We recognize that this reconstruction will in many cases be accomplished prior to our deadline and that a few systems may in fact have to reconstruct to meet our technical requirements. We recognize also that the selection of any time frame is to a certain extent arbitrary. We have chosen the ten year period, however, based upon our belief that it represents a liberal estimate of the reasonable time within which the vast majority of systems will be naturally rebuilt. By framing our requirements to correspond to the time within which the vast majority of sys-

tems will be rebuilt, even without our requirements, we have insured that such rebuilding will be accomplished with components which will allow for the future expansion of services without presenting an artificial inflationary burden to system operators which must ultimately be borne by the public.

96. Those systems with 3,500 or more subscribers located in major television markets have been on notice since 1972 of rebuild obligations. By extending our deadline for such systems we have substantially mitigated the burdens placed on them. Those systems with 3,500 or more subscribers outside of the major markets were not previously subject to any rebuild requirements. Our reasons for extending our rebuild requirements to these systems are identical to our reasons discussed earlier, for altering the criteria upon which we impose our access obligations in general. Moreover, we do not believe that our extension of rebuild requirements to these systems will be substantially burdensome. The earliest cable systems were generally constructed in communities which could not obtain adequate over-the-air television coverage. Most of these communities are outside the major television markets. In some such communities the only television ser- [324] vice that is generally available is that provided by the cable system and such systems are financially strong as well, free by virtue of their locations, from some of those incentives that might induce other systems to upgrade the quality of the service they offer. Moreover, because many such systems were in fact constructed some time ago, re-

construction may naturally be expected to occur earlier than for other systems that were constructed later in the less desirable cable markets. Accordingly, we believe our ten-year reconstruction deadline is also appropriate for these cable systems. Should the imposition of this requirement prove unduly burdensome in some isolated instances we shall treat such matters on an individual basis and, if appropriate, grant relief.[22]

The Role of the Local Franchising Authority

97. Under our prior rules, local authorities, in those communities where our rules did not apply, were permitted to adopt their own channel capacity and access channel requirement provided that these requirements were not in excess of those we had adopted for major market systems. See Sections 76.251(a)(11)(iv) and 76.251(b). While the reasons that have caused us to remove our requirements from smaller systems in the major markets might suggest the need to preclude their imposition by local authorities, we believe that room remains for local authorities to exercise their own best judgment in

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[22] We recognize that a particular problem may be encountered if there are 12 channel systems presently under construction outside of the major television markets which will eventually attain 3,500 subscribers. These systems were not formerly subject to this requirement and should therefore be given some fair margin to complete work in progress. If such systems do go into operation prior to March 31, 1977, they will be given 10 years within which to reconstruct and provide 20 channel and two-way capacity. (See Section 76.252(b))

balancing between the needs of their citizens and the costs which must ultimately be borne by them. Accordingly, with respect to systems with under 3,500 subscribers, we will not preclude local authorities from mandating channel capacity and access obligations as long as these do not exceed what our rules require of systems with 3,500 or more subscribers.

98. In addition, even for systems with more than 3,500 subscribers, we are generally prepared to see local requirements continue in effect if they do not exceed the twenty channel, two-way and four dedicated channel concepts in our rules, even if the timing on system rebuild is shorter than our own, or there is a local requirement that converters be installed to activate all of the dedicated channels, provided it can be shown that such local requirements are based on a reasoned analysis of the costs and needs for the services involved and that they will not interfere with compliance with federal obligations. However, we believe that all such obligation [sic] in excess of the rules adopted herein, if they are to be continued, should be subject to review in light of the revisions we have made in our rules because many of these requirements were adopted in reliance on our rules and without independent evaluation of them.

99. Accordingly, we shall continue to allow the imposition of local requirements which do not exceed our own. Lesser local requirements will also not be foreclosed, although for systems with over 3,500 subscribers, these would be superseded by our own rules. Local require- [325] ments which do exceed our own,

may also be permitted upon individual showings and with Commission approval. Such showings will be considered in the certification process for those systems not yet certified and for those systems seeking recertification by March 31, 1977. Other situations will be considered pursuant to the special relief provisions of Section 76.7 of the rules. In the absence of such showings, provisions exceeding our own will be considered to have no force or effect in accordance with the procedures adopted in the *Report and Order in Docket 20272*, FCC 75-897, 54 FCC 2d 855 (1975). In those situations where such showings were made and accepted under prior rules they need not be repeated and our rulings thereon will continue in effect.

100. Petitions to justify access or rebuild requirements in excess of those we are adopting today should indicate the number of channels available to provide access programming without imposing these additional requirements and how these channels are insufficient to meet demonstrated need within the community or communities. In addition, such showings should include estimates of the expected expenses involved in complying with these additional requirements, how these expenses will contribute to the quality of cable service in the community and what the effect of those expenses will be upon the financial viability of the system. To the extent that a system has pledged to comply with our prior requirements and as a result of such pledge been granted a rate increase, this also is a relevant factor in deciding whether to permit the enforcement of such a provi-

sion. It is only with a complete showing of this nature that we can realistically determine if additional rebuild or access requirements are justified, and they will not adversely affect the operator's ability to accomplish federal objectives.

Additional Matters

101. In addition to those comments already discussed, various parties advance other observations. The Ohio Educational Television Network urges, for example, the maintenance of the policy we announced in our *Notice* not to postpone rebuild requirements for those systems which do not have sufficient activated channel capacity to provide full time carriage for those television stations which are "must carry" under our rules. In support of this view OETN cites difficulties which it has encountered in obtaining carriage of "must carry" educational television stations which have within the recent past either begun broadcasting or increased transmitter power.

102. We recognize that this is a serious problem and that many of the same difficulties encountered in requiring cable systems to reconstruct to meet our channel capacity and access obligations are encountered when requiring systems to reconstruct to provide full time carriage to "must carry" stations. Clearly there are equities and public interest considerations on both sides of this situation. A television station which newly goes on the air or increases its transmitter power should be carried by a cable system operating within its area of service. On the other hand a cable system which constructs its distribution network with sufficient activated capability to provide full time carriage to all existing "must carry" stations should not, perhaps, be required to immediately reconstruct its distribution network and in-

[326] stall converters in each subscriber's home merely because one new station goes on the air or increases its transmitter power. We do not intend to finally resolve this matter in this proceeding which, as we have noted, is concerned with the channel capacity and access requirements formerly contained in Section 76.251. We shall, however, continue to analyze this area and if appropriate take further action.

103. While the majority of parties filing comments in this proceeding recognize the reasons which cause us to cancel the March 31, 1977 reconstruction deadline, a few organizations urged its reinstatement. Some of these parties also oppose our decision to separate the issues contained in *Docket 20363* from those under consideration in this proceeding. Additionally, it is argued that instead of reducing our channel capacity and access channel requirements in view of economic considerations, the Commission should increase the signal carriage available to cable television systems which will lead to the acquisition of new subscribers and an improved financial picture for the industry in general. In opposition to this suggestion, various broadcast interests argue that in view of the failure of the cable television industry to rebuild, that the entire area of signal carriage should be revisited with an eye toward adopting more restrictive limitations.

104. We have previously set out the reasons which caused us to cancel the March 31, 1977 deadline in our *Report and Order in Docket 20363, supra*, as well as the reasons which have led us to separate the issues in that docket from the issues herein under review.[23] The difficulties which we have encountered in formulating an equitable rebuild plan as well as the difficulties encountered in determining the appropriate approach to take with respect to other areas of this *Notice* have reaffirmed our belief in the wisdom of both decisions.

105. Moreover, the public interest objectives which have caused us to impose channel capacity and access channel requirements on larger cable systems are to a certain extent, different than the reasons which caused us to set various limitations on the amount of product available to cable systems in general. In the former case we seek to promote the expansion of communications services as well as the expansion of the public's access thereto, while in the latter we seek to insure that the interest of the public in maintaining a healthy commercial television structure will not be undermined. Although there is some relationship between the two considerations, each must be considered on its merits. In either case, when it appears, based upon our experience in administering our rules, that they are unnecessarily burdensome and do not further the objectives for which they are designed,

[23] See Footnote 2 in *Report and Order in Docket 20363, supra*, and Footnote 2 in *Notice of Proposed Rulemaking in Docket 20508, supra*.

we change them. Such is the case with respect to the channel capacity access channel and rebuild requirements under review today. Recently, such has also been the case with respect to various aspects of our signal carriage and subscription rules.[24]

[327] Authority for the amendments to the rules adopted in the Appendix attached hereto is contained in Sections 2, 3, 4(i) and (j), 301, 303, 307, 308, 309, 315 and 317 of the Communications Act of 1934, as amended.

Accordingly, IT IS ORDERED, That Part 76 of the Commision's Rules and Regulations IS AMENDED, effective June 21, 1976, as set forth in the Appendix attached. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

[24] For example, the Commission has recently made substantial modification to its rules applicable to specialty stations, *Report and Order in Docket 20553*, FCC 76-189, —— FCC 2d —— (1976); eliminated its leapfrogging restrictions, *Report and Order in Docket 20487*, FCC 75-1409, 57 FCC 2d 625, eliminated its ban on the subscription presentation of series programming, *Second Report and Order in Docket No. 19554*, FCC 75-1218 —— FCC 2d —— (1975), all of which increase the product available to cable television systems, hence the public, without undermining the conventional television structure.

APPENDIX

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

§ 76.13 [Amended]

1. In § 76.13, paragraphs (a)(4), (b)(4), and (c)(3) are amended to delete "§§ 76.251 and 76.253" after the words "provisions of" and substitute "§§ 76.252, 76.254, 76.256, and 76.258".

§ 76.251 [Deleted]

2. Section 76.251 is deleted.

3. A new Section 76.252 is added, as follows:

§ 76.252 *Channel capacity.*

(a) Any conglomerate of commonly-owned and technically-integrated cable television systems having a total of 3,500 or more subscribers, or any system having 3,500 or more subscribers which is not part-of such a system conglomerate, shall comply with the following requirements respecting channel capacity:

(1) *Minimum channel capacity.* Each such system shall have at least 120 MHz of bandwidth (the equivalent of 20 television broadcast channels) available for immediate or potential use for the totality of cable services to be offered.

(2) *Two-way communications.* Each such system shall maintain a plant having technical capacity for nonvoice return communications.

(b) This section applies to all cable television systems that commence operations on or after March 31, 1972, in a community located in whole or in part within a major television market. Systems which commence operations after March 31, 1977 in a community located outside of a major television market shall comply upon commencement of operations. All other systems shall comply on or before June 21, 1986. Systems that are in compliance with the provisions of subparagraph (a)(1) of this section on or before June 21, 1976 are not required to modify their facilities in order to comply with subparagraph (a)(2) of this section.

§ 76.253 [Deleted]

4. Section 76.253 is deleted.

5. A new Section 76.254 is added, as follows:

§ 76.254 *Number and designation of access channels.*

Any conglomerate of commonly-owned and technically-integrated cable television systems having a total of 3,500 or more subscribers, or any system having 3,500 or more subscribers which is not part of such a system conglomerate, shall comply with the following requirements respecting the number and designation of access channels:

(a) Each such system shall, to the extent of its available activated channel capability, comply with the following requirements:

(1) *Public access channel.* Each such system shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis;

(2) *Education access channel.* Each such system shall maintain at least one specially designated channel for use by local educational authorities;

(3) *Local government access channel.* Each such system shall maintain at least one specially designated channel for local government uses;

(4) *Leased access channel.* Each such system shall maintain at least one specially designated channel for leased access uses. In addition, other portions of its nonbroadcast bandwidth, including unused portions of the specially designated channels, shall be available for leased uses. On at least one of the leased channels, priority shall be given part-time users.

(b) Until such time as there is demand for each channel full-time for its designated use, public, educational, government, and leased access channel programming may [328] be combined on one or more cable channels. To the extent time is available therefore, access channels may also be used for other broadcast and nonbroadcast services.

(c) Each such system shall, in any case, maintain at least one full channel for shared access programming: *Provided, however,* That, in the case of systems in operation on June 21, 1976 if insufficient activated channel capability is available to provide one full channel for shared access programming it shall provide whatever portions of channels are available for such purposes. Each such system in meeting its access obligations shall make reasonable efforts in programming its bandwidth to avoid the displacement of access service.

(d) Whenever any of the channels described in paragraph (a) or (c) of this section is in use during 80 percent of the weekdays (Monday-Friday) for 80 percent of the time during any consecutive three-hour period for six consecutive weeks, such system shall have six months in which to make a new channel available for the same purposes: *Provided, however,* That the channel expansion mandated by this paragraph shall not exceed the activated channel capability of the system.

(e) Each such system shall make available all other unused channels, in addition to those which are part of the system's activated channel capability, for the purposes specified in paragraph (a): *Provided, however,* That in making available such additional channels the system operator shall be under no obligation to install converters.

(f) Until March 31, 1977, systems outside the major television markets and systems that commenced operation prior to March 31, 1972 may comply with the requirements of this section by making a reasonable effort to provide channel time for local non-operator presentation of cablecast programs.

6. A new Section 76.256 is added, as follows:

§ 76.256 *Access services.*

Any conglomerate of commonly-owned and technically-integrated cable television systems having a total of 3,500 or more subscribers, or any system having 3,500 or more subscribers which is not part of such a system conglomerate, shall comply with the following requirements respecting, the provision of access services:

(a) *Equipment requirement.* Each such system shall have available equipment for local production and presentation of cablecast programs other than automated services and permit its use for the production and presentation of public access programs. No such system shall enter into any contract, arrangement, or lease for use of its cablecasting equipment which prevents or inhibits the use of such equipment for a substantial portion of time for public access programming.

(b) *Program content control.* Each such system shall have no control over the content of access cablecast programs, however, this limitation shall not prevent it from

taking appropriate steps to insure compliance with the operating rules described in paragraph (d) of this section.

(c) *Assessment of costs.*

(1) The channels described in § 76.254 (a)(2) and (a)(3) shall be made available free of charge until five (5) years after the system first offers channel time for such cablecasting purpose.

(2) One of the public access channels described in Section 76.254(a)(1) shall always be made available without charge.

(3) Charges for equipment, personnel, and production of public access programming shall be reasonable and consistent with the goal of affording users a low-cost means of television access. No charges shall be made for live public access programs not exceeding five minutes in length.

NOTE: Systems outside the major television markets and systems that commenced operations prior to March 31, 1972 are not required to provide any free production facilities prior to March 31, 1977.

(d) *Operating rules.*

(1) For public access programming, such systems shall establish rules requiring first-come, nondiscriminatory ac-

cess; prohibiting the presentation of: any advertising material designed to promote the sale of commercial products or services (including advertising by or on behalf of candidates for public office); lottery information; and obscene or indecent matter (modeled after the prohibitions in §§ 76.213 and 76.215, respectively); and permitting public inspection of a complete record of the names and addresses of all persons or groups requesting access time. Such a record shall be retained for a period of two years.

[329] (2) For educational access programming, such system shall establish rules prohibiting the presentation of: any advertising material designed to promote the sale of commercial products or services (including advertising by or on behalf of candidates for public office); lottery information; and obscene or indecent matter (modeled after the prohibitions in §§ 76.213 and 76.215, respectively) and permitting public inspection of a complete record of the names and addresses of all persons or groups requesting access time. Such a record shall be retained for a period of two years.

(3) For leased access programming, such system shall establish rules requiring first-come, nondiscriminatory access;

prohibiting the presentation of lottery information and obscene or indecent matter (modeled after the prohibitions in §§ 76.213 and 76.215, respectively); requiring sponsorship identification (see § 76.221); specifying an appropriate rate schedule; and permitting public inspection of a complete record of the names and addresses of all persons or groups requesting time. Such a record shall be retained for a period of two years.

(4) The operating rules governing public, educational, and leased access programming shall be filed with the Commission within 90 days after a system first activates any such channels, and shall be available for public inspection as provided in § 76.305(b). Except on Commission authorization, or with respect to local government access programming, no local entity shall prescribe any other rules concerning the number or manner of operation of access channels.

NOTE—Nothing in this section shall be construed as limiting the authority of state and local entitles to regulate two-way, point-to-point, intrastate non-video cable transmissions.

7. A new Section 76.258 is added, as follows:

§ 76.258 *Non-federal access regulation; voluntary access.*

No cable television system shall be required by a state or local entity to exceed the provisions of §§ 76.252, 76.254, and 76.256 concerning channel capacity, activated channel capability, and equipment, absent Commission authorization, even if such a system has previously been certificated, pursuant to § 76.11, based on proposals or operations in excess of these provisions. If a conglomerate of commonly-owned and technically-integrated cable television systems having a total of fewer than 3,500 subscribers, or any system having fewer than 3,500 subscribers which is not part of such a system conglomerate, provides access services, it shall comply with the provisions of § 76.256(b) and (d).

8. In § 76.305, paragraph (a)(7) is revised to read as follows and paragraph (c) is amended to delete "Section 76.205(c), 76.251(a)(11), and 76.311(f)" after the words "periods specified in" and substitute "§ 76.95(d), 76.205(c), 76.221(f), 76.225(a), 76.256(d), and 76.311(f)."

§ 76.305 *Records to be maintained locally by cable television systems for public inspection.*

(a) * * *

(7) A copy of all records which are required to be kept by § 76.95(d) (network program nonduplication private agreements); § 76.205(c) (origination cablecasts by candidates for public office); § 76.221(f) (sponsorship identification); § 76.225(a) (subscription cablecasting); § 76.256(d)

(operating rules for access channels); § 76.311(f) (equal employment opportunities);

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STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS CONCURRING IN PART; DISSENTING IN PART

In Re: Cable Television Channel Capacity and Access Channel Requirements (Docket No. 20508)

Somewhere along the way to the "wired nation," something went haywire and this action takes cognizance of the lot of shortcircuited expectations. Because we cannot expect blood from a turnip, I concur in the main with the substantive rule changes herein which lower our expectations to more realistic levels under today's economic and technological conditions. Arguing over the nits and gnats of these new access requirements would be unavailing when it is the concept of *unlimited* access on which most adherents fixed their sights.

[330] However, I dissent to the postponement of the effective date of these revised standards for an entire decade. Just as we were unable to predict five years ago what the conditions would be in 1977, we are unable to foresee what conditions will be like in the next several years when the income to the cable systems from pay TV and savings from recent reregulation efforts are available. Thus, I am in accord with the suggestion of the United Church of Christ and others that our deferment should be of shorter duration, perhaps three years, when we could again review this matter.

Concurring Statement of Commissioner Abbott Washburn—Docket 20508

While I am in agreement that the decision by the majority represents a reasonable approach to the 1977 rebuild requirements, I have some concern about the 3,500 subscriber cut-off for channel capacity and two-way capability. I would have preferred to see a requirement that all systems of 1,000 or more subscribers be built with 20 channel capacity and two-way capability. As Metromedia Corp. pointed out in their comments,[1] a system's channel capacity is most likely determined prior to the time the first subscriber is signed up and, therefore, a triggering number of subscribers leaves the operator unable to determine his responsibilities. Of course to the extent that builders of new systems anticipate a system size of 3,500 or more subscribers they will include 20 channel capacity and two-way capability in their building plans.

Abundant channel capacity and two-way capability are essential to the development of services to subscribers which have always been associated with the long-range "promise" of cable-TV. I would therefore encourage builders and rebuilders of systems of any size to include 20 channel capacity and two-way capability in their construction plans.

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[1] See paragraph 28.

Concurring Statement of Commissioner Glen O. Robinson

I concur in the Commission's action today in modifying its 1972 capacity, access channel and related requirements. The requirements were the product of expectations generated in cable's go-go years when the benefits of cable were sold as peddlers once sold Lydia Pinkham's Vegetable Compound, a veritable elixer for the ills of our time. The booster years have (for the most part) passed. With them have passed some of the unrealistic expectations built upon them—among others our 1972 requirements for channel capacity, access and program origination services which the Commission wisely recognizes could not possibly be met in its original timetable without producing drastic damage to the financial structure of the industry and placing serious obstacles in the way of future development.

I would go somewhat further than the majority in removing the burdens of the 1972 rules. In an earlier Commission action modifying the program origination requirements, I doubted the wisdom of requiring the development of physical plant anterior to any evidence that this capital would ever be productively employed. See, *Cable Televi-* [331] *sion Service*, 49 FCC 2d 1090, 1111 (1974) (separate statement). I still do.

My doubts apply as well to the requirement of access channels.[1] As I said at the outset of this pro-

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[1] In contrast to the free access channels, the provisions requiring availability of leased channels do not involve any

ceeding, *Cable Television Channel Capacity*, 53 FCC 2d 782, 789 (1975), I do not think the case for these requirements, particularly those commanding free access channels, has been made. I would not rule out the possibility that at some point in the future of cable some provision for access channels might reasonably be commanded, on the theory, I suppose, that this is a "merit good" whose provision ought not to be left to market determination.[2] However, given the very light demand for access channels, I continue to question our requirement for free access channels at this time. I fully concede that the issue is less than a burning one inasmuch as the Commission has removed most of the burden of its 1972 access requirements. Nevertheless, so long as the requirement en-

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subsidy element; regulation here is presumably intended to correct a local system's incentives, as a monopolist, to restrict the supply of its product. Earlier, I questioned whether such a correction was practically necessary in this situation. However, insofar as our requirements go no further than to compel the system to respond to demand *as it is manifested* (and not as we foresee it years in the future), I accept it as possibly beneficial and, at worst, harmless.

[2] Earlier I suggested "merit goods" were those "which like spinach and Latin lessons are 'good' for us and which we should have—whether or not we want them bad enough to pay for them." 53 FCC 2d 800. I have since been informed that the spinach illustration is a poor one since its ancient esteem as a source of dietary iron has been destroyed by modern biochemistry. This exposes a central problem with merit goods: who decides whether and in what degree they are, in fact, meritorious?

tails some cost[3]—if only just the opportunity cost of other possible uses of the channel—I think we ought to declare a moratorium on the requirement until we see what a fully mature cable industry looks like.

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[3] Free access, like other forms of "free" lunch, must, of course, be paid for by someone, but it is in the nature of such goods that they are not wholly paid for by those who consume them. The present illustration is no exception. The costs will no doubt be borne partly by cable entrepreneurs and partly by subscribers most of whom, judging from current evidence, will not use or view the access channels.

APPENDIX C

F.C.C. 76-1122

[62 F.C.C. 2d 399]

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Docket No. 20508

IN THE MATTER OF AMENDMENT OF PART 76 OF THE COMMISSION'S RULES AND REGULATIONS CONCERNING THE CABLE TELEVISION CHANNEL CAPACITY AND ACCESS CHANNEL REQUIREMENTS OF SECTION 76.251

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

(Proceeding Terminated)

(Adopted: November 30, 1976;

Released: December 21, 1976)

BY THE COMMISSION: COMMISSIONER LEE ABSENT; COMMISSIONERS HOOKS AND WASHBURN CONCURRING IN THE RESULT; COMMISSIONER WHITE CONCURRING AND ISSUING A STATEMENT IN WHICH COMMISSIONER FOGARTY JOINS.

1. On April 1, 1976, the Commission adopted its *Report and Order in Docket 20508*, FCC 76-313, 59 FCC 2d 294 (1976), terminating an extensive rulemaking proceeding concerning cable television channel capacity and access channel requirements. Following its release, petitions were received urging that reconsideration be given to several of the newly adopted changes. Two parties filed statements supporting the petitions, and one response also was received.

2. In 1972 the Commission set out to guarantee a realization of cable television's promised potential by adopting a comprehensive scheme for the regulation of cable television systems throughout the nation, including a framework for the development and use of access and nonbroadcast channels. In part, it required cable systems located within major television markets to possess a fixed minimum channel capacity of at least 20 channels with a capability to expand should additional channels be needed for specifically designated access purposes.[1] The guiding principle was that the Commission ". . . must make [400] an effort to ensure the development of sufficient channel availability on all new CATV systems to serve specific

[1] See *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, paras. 117 through 127 (1972).

recognized functions." [2] Systems in operation before the rules were adopted were required to come into full compliance with these standards by reconstructing their plant and distribution networks within five years—that is, by March 31, 1977. By 1975 the Commission recognized that this initial regulatory framework imposed an undue financial burden on many cable system operators. Thus, the 1977 deadline was canceled [3] and this proceeding initiated to inquire into alternative methods of obtaining access channels on older systems within recognized economic restrictions, and to inquire into channel capacity and access requirements for old and new systems.[4]

3. Briefly, the rules now require larger cable systems (3500 or more subscribers) to have available for potential use a minimum channel capacity of 20 channels and two-way capability. "Old (pre-1972) systems" are given ten years, or until their "natural rebuild," within which to meet the requirements. In addition four dedicated access channels continue to be required, if activated channel capability is available and demand exists for their full time use. Otherwise, one "composite" channel or "blackout" time—where a duplicating program is blacked out to protect another station—may be used to fulfill the access obli-

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[2] *Second Further Notice of Proposed Rulemaking in Docket 18397-A*, FCC 70-676, 24 FCC 2d 580, 587 (1970).

[3] *Report and Order in Docket 20363*, FCC 75-821, 54 FCC 2d 207 (1975).

[4] *Notice of Proposed Rulemaking in Docket 20508*, FCC 75-644, 53 FCC 2d 782 (1975).

gations. While the Commission "in no case" will require rebuilding or the installation of converters solely to provide channel space for access services, system operators may not "exclude a potential access user who intends to . . . install a converter himself." These rules form the basis for three of the reconsideration petitions.

4. Several staff members of the Cable Television Information Center argue that the *Report and Order* represents an "ill considered" and fundamental reversal of long standing Commission policy relating to access programming. Their assertions are contained in a "Petition for Reconsideration," supported by the Alternate Media Center at the New York University School of the Arts, and the New York State Commission on Cable Television. In particular, CTIC views two new policies as unsound: (1) provision of an access channel only when there is sufficient activated capacity, and (2) no requirement that converters be provided to meet access requirements even if demonstrated use and need can be established. CTIC's position is premised on the proposition that without multiple channel availability, stimulation, development, and diversity of access programming is impossible, a proposition, it argues, the Commission asserted in the *Cable Television Report and Order*, *supra*, at para. 120, the *Reconsideration of the Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 478 at para. 79 (1972) and the *Clarification of Rules and Notice of Proposed Rulemaking*, FCC 74-384, 46 FCC 2d 175 at para. 13 (1974). Not only do the new rules

implement a policy of "limited availability" but the burden of providing additional channel capacity (financing and obtaining special relief from the Commission) has been shifted from the cable operator to the potential channel users, who lack the requisite financial resources, and [401] the local franchising authorities, who generally lack the expertise needed to produce an acceptable showing of special relief. CTIC concludes that cable's strength rests in its surplus channel capacity and its availability to all potential users. Upon reconsideration, the Commission is urged to adopt three policies: a) Require at least one composite access channel on all large (over 3500 subscriber) systems, subject to a waiver if the operator demonstrates that compliance would result in financial hardship; b) Permit delivered channel capacity to be the subject of negotiation between the cable operator and the franchising authority without Commission review; and, c) Require limited access to medium-sized (1000-3500 subscriber) systems.

5. The National Cable Television Association together with the California Cable Television Association responded[5] to CTIC's petition, specifically addressing each of the three proposals and urging rejection of the petition. Larger systems should not be required to provide at least one complete access channel, they argue, because of the undue financial bur-

[5] The "Response to Petition for Reconsideration" was late filed, but accompanied by a "Motion to Accept Late Filing" due to an unexpected delay in normal delivery service. The motion is hereby granted.

den it imposes, the limited nature of the exemption, and the impending need to rebuild systems to accommodate new services. Local authorities should be preempted from imposing stricter access requirements than the Commission's because past experience has demonstrated the imposition of abusive and unjustified requirements. Finally, access requirements should not be reimposed on medium sized systems because these are the systems already burdened by overregulation and for which additional financial requirements in the form of converters "would not be minimal." NCTA and CCTA conclude by stating that the Commission has reaffirmed rather than reversed its prior policy and that the burden of proof logically has been placed on the party who seeks a waiver of the existing rules.

6. There should be no mistake regarding the Commission's continuing commitment to the provision of access services and channels. However, as we stated in the *Report and Order*, this is a very difficult area. Since adoption of the initial access rules in 1972, the Commission has accumulated, through experience and comments, much information regarding the public benefits and corresponding costs of access. Our general reevaluation of the 1972 rules was not intended to reverse our position and the resulting modifications do not constitute such an action.[6] Instead the *Report and Order* is a recognition that certain limitations

[6] In fact, preliminary findings indicate that more cable subscribers will be affected by the new rules than were by the old ones, because of their extension to smaller markets.

exist which make imposition of the original requirements unduly burdensome, ultimately impairing total cable television service to the public. Therefore, modifications were adopted revising the obligations in part and delaying their effective date.

7. We reject CTIC's first proposal, that every system with 3500 or more subscribers have one full composite access channel, for the reasons stated in the *Report and Order* when we determined to modify our original mandatory expansion requirement.[7] At that time we reviewed the cost of converter installation and the corresponding benefits. Our conclusion was that the costs involved when weighed against the potential benefits were unreasonable. And it should be emphasized [402] here that we are concerned not just with the costs to the system operator but also with those costs which must in the long run be passed on to subscribers. The CTIC staff petition has not convinced us that our original decision was in error or that the burden should be cast on the system operator in each instance to show that provision of the channel would be unduly burdensome. It should be emphasized, however, that the rule applicable to new systems commencing operation are somewhat more restrictive and do require that at least one channel be available for access purposes. See Section 76.254(c). Older systems are exempted from the requirement only if they lack sufficient channel capacity to provide a full channel and even those systems without full channels available are required to accommodate access programming on nonduplication "blackout" time on channels otherwise carrying broadcast signals.

[7] See discussion beginning at paragraph 58.

8. The CTIC staff's second proposal goes to the question of whether local authorities should be permitted to require channel capacity and access obligations beyond those contained in the Commission's Rules. We expressed the belief in the *Report and Order* that excessive burdens dictated by local authorities created no less an undue strain on system operators and cable subscribers than those imposed by the Commission. We did provide, however, that local authorities could require services and facilities beyond those required by the Commission when the need for such additional facilities could be documented and the costs imposed have a rational relationship to the likely benefits that cable subscribers will receive. The procedures to be followed in justifying such additional requirements are specified in paragraphs 97-100 of the *Report and Order*. We recognize that this procedure cast some burden on the franchise authority to present concrete data on costs and proposed channel uses, but we do not feel this is inappropriate in that this is a burden of analysis which should already have been assumed for purposes of making the decision to require the additional channels or services.[8] To the extent such obligations are being imposed to provide channels for services, the particulars of which are unknown, we believe this imposes a burden which cannot be justified. We do recognize, of

[8] In this respect, see *Arlington Telecommunications Corporation*, FCC 75-670, 53 FCC 2d 757 (1975); and *Total Communications of Irving, Inc.*, FCC 74-157, 45 FCC 2d 525 (1974).

course, that there may be instances where cities may wish to impose contingent obligations. That is, for example, having budgeted or planned for the completion of an educational or governmental telecommunications facility some time in the future a city may want to require a cable television distribution capacity for the facility's programming. A present requirement for such a capacity would be hard to justify but that would not preclude our acceptance of a contingent term in a cable system franchise under the procedures specified in the *Report and Order*. Properly documented requests have been granted by the Commission in the past and should receive our sympathetic consideration in the future. Additionally, we reiterate our acquiescence in voluntary actions taken by cable operators to provide access services in excess of federal standards. Although channel capacity and access channel regulations have been preempted, prohibiting mandatory franchise terms more burdensome than the Commission's, we refer to our statement in *Comcast Cable of Paducah*, FCC 76-965, —— [403] FCC 2d —— (1976), that "no Commission Rule or Regulation would prohibit a cable system from voluntarily providing . . . access services in excess of Commission requirements," so long as any such commitment by the cable operator is "made in a genuinely voluntary atmosphere."

9. The last of CTIC's proposals is for a multi-tiered approach to the access channels, with systems of between 1000 and 3500 subscribers being required to provide some access channels for use by groups with their own production equipment but with no requirement that the system itself have any production capability. We considered the adoption of such an approach in the *Report and Order* and decided not to adopt it in an effort to simplify an already complex set of rules and in view of the burdens such obligations could impose on smaller systems. Nothing presented in the CTIC petition persuades us now to alter that judgment. We would expect, however, that all systems that have unused channel space available which others wish to use for public, educational, governmental, or leased purposes would cooperate fully and make channel space available. It is, generally, to the cable system operator's advantage to fill up his available channels by whatever means are available. If instances do come to light where non-operator use of otherwise unused channels is denied without explanations, we hope these will be brought to our attention so that further consideration can be given to rule changes in this area. Our present experience has been, however, that even larger systems typically have difficulty finding access channel users so this problem with smaller systems is not likely to arise with any frequency. It should also be noted that local authorities are free to impose requirements of their own on such systems as long as those requirements do not exceed those in our rules. See Section 76.258 of the Rules.

10. Several cable television companies, in a "Joint Petition for Partial Reconsideration," [9] also urge the

[9] The joint cable television operating companies are: Coachella Valley Television; Colony Communications, Inc.; Complete

Commission to reconsider its position with regard to the role of local franchising authorities. They argue that a rollback of federal obligations may be ineffectual when local authorities are permitted to impose their own standards and that this "dual jurisdictional" approach places operators between the Commission and the local authorities, making them agents of the Commission where authorities refuse to recognize the Commission's paramount authority. They suggest a halt to city waivers based upon a "reasoned analysis," and ask instead that the Commission impose a complete moratorium on any local or state consideration of access or rebuild requirements until after a system obtains renewal or franchise amendments required to meet the 1977 filing requirements.[10] Both the NCTA and the CCTA make similar arguments in their "Petition for Reconsideration." As stated in response to CTIC's proposal, we have determined to maintain our preemption in this area, but with a recognition that local circumstances may justify access standards other than those we have dictated. These local standards will not be approved [404] except upon a detailed showing as discussed at

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Channel TV, Inc.; Cox Cable Communications, Inc.; Gulf Coast Television, Inc.; Sammons Communications, Inc.; Sioux Falls Cable Television; Televents Affiliated Systems; and The TM Communication Company.

[10] The length of such a moratorium has been rendered indefinite by our action in Docket 21002, FCC 76-1070, generally reviewing the franchise requirements, and this is another reason for not adopting such a freeze.

paragraph 100 of the *Report and Order*. Abuses may occur, but we anticipate no widespread problems that cannot be dealt with on an individual basis once they are brought to our attention.

11. The reconsideration petitions of NCTA and CCTA, and the several cable companies, also suggest that adoption of the "third party user" rule, whereby access is guaranteed to a potential user willing to install converters, constitutes a major policy decision made without proper notice, explanation, or comments.[11] The primary problem, they assert, is that guaranteed access for third party users transforms cable operators into common carriers, a status the Commission previously has refused to confer upon cable television. These arguments closely parallel those raised by Midwest Video Corporation in its appeal of the Commission's adoption of Section 76.253 in the *Report and Order in Docket 19988*, FCC 74-1279, 49 FCC 2d 1090 (1974), and in this proceeding. Our decision to reject the claims is based on a belief that the adopted regulations reasonably relate to our regulation of cable television pursuant to the objectives of the Communications Act of 1934, as amended.[12] Cable television is a "hybrid" industry, characterized both by broadcast and common carrier traits. As we stated at paragraph 17 of the *Report and Order*:

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[11] See *Report and Order* at para. 66.

[12] See also, *TM Communications Company*, FCC 76-966, —— FCC 2d —— (1976).

> So long as the rules adopted are reasonably related to achieving objectives for which the Commission has been assigned jurisdiction we do not think they can be held beyond our authority merely by denominating them as somehow "common carrier" in nature.

12. NCTA and CCTA also pose a somewhat more practical question with respect to a third party user's right to interconnect on a cable system. They argue that problems concerning installation and maintenance may interfere with the quality of service provided to subscribers. The Commission is aware that such problems may occur. Although we speak of a "guaranteed right" of access by third party users, we do not mean so unqualified a right that a cable operator is compelled to accept the installation of inferior equipment or improper service which will result in harm to his system. On the other hand, it is the operator's responsibility to demonstrate, well beyond mere allegations, that proper service will be impeded with the addition of another's equipment. In those instances where time or experience is necessary to determine the effects of additional equipment we expect the operator to make available that opportunity.[13] The burden is on the operator to show harm rather than on the user to prove the absence of harm.

13. Finally NCTA and CCTA argue that required utilization of the last available channel for access

[13] We recognize however, that posting bond may be appropriate if installation and testing is necessary to determine whether "harm" will occur.

services discriminates against pay television programming, and also runs counter to the Commission's policy of requiring dedicated access channels only when actual demand can be demonstrated. We have stated repeatedly our commitment to the provision of access services. Even so, we have reduced the burden on cable operators so that they may fulfill their obligations with the provision of only one access channel. However, we believe access pro- [405] gramming should continue to have priority status over operator-originated programming where they compete for the final available channel on a cable system. At paragraph 68 of the *Report and Order* we resolved this question by stating: "While we shall continue to encourage operators to originate, we do not believe that the public interest will be served if such efforts are at the expense of others who wish to provide access programming." [14]

14. A final issue for reconsideration is submitted by Community Communications Project of New Paltz, Inc., located in New Paltz, New York. Community asserts that minimum equipment requirements for access channels should be specifically designated. For access service to develop Community believes the signal emanating from the access facilities must be comparable to that of other signals carried on the cable

[14] The priority afforded access under this policy is not inconsistent with the "demand" basis for channel commitment. It simply recognizes that demand is unlikely to develop if all channel space is filled, and that even if demand did develop it would not likely be met if programming had to be "bumped."

system. Although we are not prepared to dictate equipment standards at this time, we do intend to monitor the situation to make sure that access is not being defeated by poor technical quality. If we determine that standards are required to insure the development of access services, we will take appropriate action.

15. Apart from the several issues noted as proposed grounds for reconsideration, the Commission has received numerous inquiries seeking clarification of various sections of the new rules. Thus, it is appropriate to review these sections to make clear our expectations for their implementation.

(a) *Certification of "May Carry" Signals*: At paragraph 64 of the *Report and Order* we stated that:

> [W]e do not envision certificating new systems, or the addition of new signals whose carriage is not mandatory to existing systems, if the activated channel capability available for the provision of access services is insufficient to provide at least one full channel for access programming
>
> We will, however, certificate new systems or "may carry" signals upon assurance by the applicant cable operator that at least one channel will be reserved full time, for access purposes. In other words, "may carry" signals may be certified beyond the system's activated channel capability if assurance is given that the signals will share channel space with each other to the extent necessary to preserve the one full time access channel. We have amended Section 76.254 (b) of the Rules to make it clear, in conformity with the paragraph quoted above, that at least one channel must be reserved full time for the exclusive presentation of access programming except in the case of systems operating on June 21, 1976 and having insufficient channel capability. See attached Appendix.

(b) *Previously Certified Access Programs*: Implementation of previously certified access programs now exceeding our rules may continue only upon an appropriate showing and Commission approval unless such a showing was made and accepted under the prior rules. Beginning at paragraph 97 of the *Report* [406] *and Order* we outline our treatment of locally imposed access requirements concluding that "in the absence of such showings, provisions exceeding our own will be considered to have no force or effect . . ." and "in those situations where such showings were made and accepted under prior rules, they need not be repeated and our rulings thereon will continue in effect."

(c) *"Blackout" Time*: Provision has been made for the use of "blackout" time to accommodate access programming on those cable systems without sufficient activated channel capability. Use of "blackout" time was granted in lieu of forcing the operator to rebuild or install converters. Therefore, we expect a maximum effort to make this time

available. For instance, an assertion that "blackout" time does not exist because of dual channel carriage of network programming is an unacceptable excuse for denial of time to a potential access user.

(d) *Availability of Access Time and Charges for Access Presentations*:

(1) A number of questions have arisen as to the conditions under which access channel time must be made available and as to the procedures for resolving disputes concerning the availability of access channel time. As to the latter question the access channel rules adopted by the cable television system operator provide the basic mechanism for regulating channel usage. We have not included, beyond the specifications contained in Section 76.256 of the Rules, every detail of what these rules should contain, leaving cable operators some leeway to experiment with the details of the rules and to accommodate them, in a reasonable fashion, to local conditions. Questions as to the reasonableness of particular sets of rules should be referred to the Commission for resolution. Every effort will be made to resolve these questions on an informal basis, but more formal proceedings will be commenced if necessary.

(2) Among the matters left initially to the operator's discretion in the rules adopted are the hours during which production facilities and channels are to be available for use. Some questions have been asked as to whether it is adequate to simply have access channels and equipment available during normal business hours (9 a.m. to 5 p.m., for example). In the ordinary circumstances we would not consider such a limitation to be within the intent of the rules, in view of the predominance of television viewing during the evening (prime time) hours. Access limited to day time hours only would thus not be access to the most significant block of viewing audience. We do not, however, require that the equipment and channels be available twenty-four hours a day, seven days a week.

(3) Charges for production equipment use should also be spelled out in the appropriate access channel rules. As we indicated in the *Report and Order*, except for a free five [407] minutes of live time, charges may be made not only for the equipment used but also for any system personnel involved in the program production effort. Such charges should be "reasonable and consistent with the goal of affording users a low-cost means of television access." Section 76.256(c)(3). In permitting charges for production time, however, we did not intend to include charges for the playing of tapes or film provided by public access

channel users when no use of system production equipment is involved and the programming presented is in a format compatible with that of the system. That is, it should be possible for a public access channel user who has produced a program on his own to deliver that program to the system and have it played without additional charge.

(e) *Operating Rules*:

(1) We remind all cable operators that rules governing public, educational, and leased access programming are required to be filed with the Commission within 90 days after a system first activates any such channel, and also are to be made available for public inspection. See Section 76.256(d)(4). This requirement is not new, and we will expect full compliance henceforth. Also, because more than one local government may be sharing use of the government access channel, we urge that each cable operator include in his operating rules a provision assuring channel availability for use by each local government jurisdiction served by the cable system.

(2) We note the omission of an exception contained in former Section 76.251(a)(11)(iv) of the Rules for some pre-1972 cable systems. The oversight was inadvertent and we are restoring it as part of Section 76.256(d)(4). See Appendix.

In view of the foregoing, a denial of the reconsideration requests and issuance of the clarification would be in the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Reconsideration" filed by the Community Communications Project of New Paltz, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Joint Petition for Partial Reconsideration" filed by Coachella Valley Television; Colony Communications, Inc.; Complete Channel TV, Inc.; Cox Cable Communications, Inc.; Gulf Coast Television, Inc.; Sammons Communications, Inc.; Sioux Falls Cable Television; Televents Affiliated Systems; and the TM Communications Company, IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Reconsideration" filed by the National Cable Television Association and the California Cable Television Association, IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Reconsideration" filed by Paul J. Fox, Susan C. Greene, Harold E. Horn, Shelia Mahony, and Victor Nicholson, staff members of the Cable Television Information Center of the Urban Institute, IS DENIED.

[408] IT IS FURTHER ORDERED, That Part 76 of the Commission's Rules and Regulations IS AMENDED, effective January 28, 1977, as set forth in the Appendix attached.

Authority for the amendments to the rules adopted in the Appendix attached hereto is contained in Sections 2, 3, 4(i) and (j), 301, 303, 307, 308, 309, 315

and 317 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. Section 76.254(b) is revised to read as follows:

§ 76.254 Number and designation of access channels.

* * * *

(b) Until such time as there is demand for each channel full time for its designated use, public, educational, government, and leased access channel programming may be combined on one or more cable channels. To the extent time is available therefor, access channels may also be used for other broadcast and nonbroadcast services except that at least one channel shall be maintained exclusively for the presentation of access programming as required by paragraph (c) of this Section.

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2. Section 76.256(d)(4) is revised to read as follows:

§ 76.256 Access Services.

* * * *

The operating rules governing public, educational, and leased access programming shall be filed with the Commission within 90 days after a system first activates any such channels, and shall be available for public inspection as provided in § 76.305(b). Except the Commission authorization, or with respect to local government access programming, no local entity shall prescribe any other rules concerning the number or manner of operation of access channels; however, franchise specifications concerning the number of such channels for systems in operation prior to March 31, 1972 shall continue in effect.

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CONCURRING STATEMENT OF COMMISSIONER MARGITA E. WHITE IN WHICH COMMISSIONER JOSEPH R. FOGARTY JOINS

Four years ago the Commission decided to require all cable systems in major television markets to have a 20-channel capacity by March 31, 1977, in order to permit certain types of access programming. (See Section 76.251 of the Rules.)

Earlier this year, however, the Commission concluded that the benefits of the nationwide Federal access requirement were outweighed by the costs incurred in order to provide the access. *Cable TV Capacity and Access Requirements,* 59 FCC 2d 294, 313 (1976). Thus, where "community boundaries [did] not correspond to the technical and economic

realities of cable television construction," the Commission amended its rules to apply access requirements on a head-end basis. 59 FCC 2d at 302. Where the system was deemed too small to bear the burdens of providing access services (i.e. less than 3500 subscribers), the system was exempted. 59 FCC 2d at 303. For all systems, the deadline for implementing reduced requirements was changed from March 31, 1977 to June 21, 1986. Section 76.252 of the Rules, 50 FCC 2d at 327.

In reaching its decision to reduce or eliminate certain access requirements, the Commission decided that the cost of converters necessary [409] to provide access channels should not be imposed upon all subscribers. The Commission, however, went beyond simply reducing an onerous requirement imposed on all systems by a distant Federal government. It has, in essence, preempted local authority to negotiate and agree upon franchise terms, based on local need and experience, which call for access channels in excess of the minimal Federal standard. Section 76.258; 59 FCC 2d at 324-25. Absent Commission permission by waiver of Section 76.258, franchise provisions exceeding the Commission's minimum "will be considered to have no force or effect." 59 FCC 2d at 324-25.[1]

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[1] The Commission defers to "voluntary actions" taken by cable operators. But because Section 76.258 of the Rules remains unchanged, even a commitment by the cable operator "made in a genuinely voluntary atmosphere" during franchise negotiations would remain null and void without a waiver by the Commission. Thus, the city would have no way to enforce a promise made by the cable operator upon which the local government relied when granting the franchise. Moreover, the waiver process is cumbersome, time-consuming and adds uncertainty in the negotiation process.

I generally support, as reasonable, the Commission's decision to reduce the Federally mandated access requirement. However, I have reservations as to the wisdom of federal preemption of local government decisions to add access requirements which go beyond those required by the Commission.[2]

While the minimum access standards called for by the Commission are reasonable, I question whether it is appropriate for the Commission to deny local governments the right to negotiate and agree upon franchise terms, based on local needs and a local determination of policy, which call for access channels in excess of the Federal standards. Where a city has made a determination through the political process that there is good reason to exceed those standards and the cable operator has freely agreed to accept a franchise including subscriber rates which contemplate that capacity, I do not believe the city should be required to ask the Federal government's leave to include such terms in the franchise.

The Commission's basis for preemption is a "belief" that local authorities will dictate "excessive burdens" and create "an undue strain on system operators and cable subscribers." (Para. 8) However,

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[2] Aside from the wisdom of this action, there are doubts as to the extent of permissible Commission preemption of state and local authority absent statutory authorization. See *NARUC* v. *FCC*, —— U.S. App. D.C. ——, 533 F.2d 601 (1976).

while the Commission amply substantiated the need to reduce the Federally mandated access requirement, no similar justification is provided for preventing local governments from fully exercising their franchise authority. The absence of evidence of excessive burdens being imposed on many cable operators confirms my view that the issue can be resolved best through the free marketplace and the democratic process. The system operator has the option of refusing unreasonable demands and the subscriber—as the affected consumer—has the opportunity to interface directly with his locally elected officials.

The American people are expressing growing concerns over their inability to impact upon a remote Federal government in Washington and are asking for a greater voice in government decisions affecting them. The basic question here is which jurisdiction can be most respon- [410] sive to the public interest. In my view, it is the government closest and most accessible to the people.

Moreover, the Commission itself, as part of its reregulation process, is considering eliminating Federal supervision of local franchises. Hence, it seems especially questionable at this time for the Commission to entrench its role in the local franchise negotiating process.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1977

No. 76-1496

MIDWEST VIDEO CORPORATION, PETITIONER,

vs.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS,

COLDWATER CABLEVISION, INCORPORATED, MICHIGAN CA-TV COMPANY, AMERICAN BROADCASTING COMPANIES, INC. and BILL CABLE, INC. and WESTERN COMMUNICATIONS, INC., INTERVENOR-RESPONDENTS.

No. 76-1839

AMERICAN CIVIL LIBERTIES UNION, PETITIONER,

vs.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS.

AMERICAN BROADCASTING CO., INC., GILL CABLE, INC. and WESTERN COMMUNICATIONS, INC., CITIZENS FOR CABLE AWARENESS IN PENNSYLVANIA, et al., COLDWATER CABLEVISION, INC., MICHIGAN CA-TV COMPANY, MIDWEST VIDEO CORPORATION, INTERVENORS.

Petition for review of order of the
Federal Communications Commission

On motion of Federal Communications Commission, it is now here ordered that the issuance of the mandate herein in these causes, be and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

April 4, 1978

APPENDIX E

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter. June 19, 1934, c. 652, Title I, § 1, 48 Stat. 1064; May 20, 1937, c. 229, § 1, 50 Stat. 189.

* * * *

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the

licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

* * * *

§ 153. Definitions

* * * *

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

* * * *

§ 303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention

insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

* * * *

§ 307. Licenses; allocation of facilities; terms; renewals

* * * *

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * * *

APPENDIX F

§ 76.251 *Minimum channel capacity; access channels.*

(a) No cable television system operating in a community located in whole or in part within a major television market, as defined in § 76.5, shall carry the signal of any television broadcast station unless the system also complies with the following requirements concerning the availability and administration of access channels:

(1) *Minimum channel capacity.* Each such system shall have at least 120 MHz of bandwidth (the equivalent of 20 television broadcast channels) available for immediate or potential use for the totality of cable services to be offered;

(2) *Equivalent amount of bandwidth.* For each Class I cable channel that is utilized, such system shall be capable of providing an additional channel, 6 MHz in width, suitable for transmission of Class II or Class III signals (see § 76.5 for cable channel definitions);

(3) *Two-way communications.* Each such system shall maintain a plant having technical capacity for nonvoice return communications;

(4) *Public access channel.* Each such system shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at

least the minimal equipment and facilities necessary for the production of programming for such a channel. See also § 76.201;

(5) *Education access channel.* Each such system shall maintain at least one specially designated channel for use by local educational authorities;

(6) *Local government access channel.* Each such system shall maintain at least one specially designated channel for local government uses;

(7) *Leased access channels.* Having satisfied the origination cablecasting requirements of § 76.201, and the requirements of paragraph (a)(4), (a)(5) and (a)(6) of this section for specially designated access channels, such system shall offer other portions of its nonbroadcast bandwidth, including unused portions of the specially designated channels, for leased access services. However, these leased channel operations shall be undertaken with the express understanding that they are subject to displacement if there is a demand to use the channels for their specially designated purposes. On at least one of the leased channels, priority shall be given part-time users;

(8) *Expansion of access channel capacity.* Whenever all of the channels described in paragraphs (a)(4) through (a)(7) are in use during 80 percent of the weekdays (Monday-Friday) for 80 percent of the time during any consecutive three-hour period for six consecutive weeks, such system shall have six months in which to make a new

channel available for any or all of the above-described purposes;

(9) *Program content control.* Each such system shall exercise no control over program content on any of the channels described in paragraphs (a)(4) through (a)(7) of this section; however, this limitation shall not prevent it from taking appropriate steps to insure compliance with the operating rules described in paragraph (a)(11);

(10) *Assessment of costs.* (i) From the commencement of cable television service in the community of such system until five (5) years after completion of the system's basic trunk line, the channels described in paragraphs (a)(5) and (a)(6) of this section shall be made available without charge.

(ii) One of the public access channels described in paragraph (a)(4) of this section shall always be made available without charge, except that production costs may be assessed for live studio presentations exceeding five minutes. Such production costs and any fees for use of other public access channels shall be consistent with the goal of affording to public a low-cost means of television access;

(11) *Operating rules.* (i) For the public access channel(s), such system shall establish rules requiring first-come nondiscriminatory access; prohibiting the presentation of: any advertising material designed to promote the sale of commercial products or services (including advertising by or on behalf of candidates for public office); lot-

tery information; and obscene or indecent matter (modeled after the prohibitions in §§ 76.213 and 76.215, respectively); and permitting public inspection of a complete record of the names and addresses of all persons or groups requesting access time. Such a record shall be retained for a period of two years.

(ii) For the educational access channel(s) such system shall establish rules prohibiting the presentation of: any advertising material designed to promote the sale of commercial products or services (including advertising by or on behalf of candidates for public office); lottery information; and obscene or indecent matter (modeled after the prohibitions in §§ 76.213 and 76.215, respectively); and permitting public inspection of a complete record of the names and addresses of all persons or groups requesting access time. Such a record shall be retained for a period of two years.

(iii) For the leased channel(s), such system shall establish rules requiring first-come, non-discriminatory access; prohibiting the presentation of lottery information and obscene or indecent matter (modeled after the prohibitions in §§ 76.213 and 76.215, respectively); requiring sponsorship identification (see § 76.221); specifying an appropriate rate schedule; and permitting public inspection of a complete record of the names and addresses of all persons or groups requesting time. Such a record shall be retained for a period of two years.

(iv) The operating rules governing public access, educational, and leased channels shall be filed with the Commission within 90 days after a system first activates any such channels, and shall be available for public inspection at the system's offices. Except on specific authorization, or with respect to the operation of the local government access channel, no local entity shall prescribe any other rules concerning the number or manner of operation of access channels; however, franchise specifications concerning the number of such channels for systems in operation prior to March 31, 1972 shall continue in effect.

(b) No cable television system operating in a community located wholly outside of all major television markets shall be required by a local entity to exceed the provisions concerning the availability and administration of access channels contained in paragraph (a). If a system provides any access programming, it shall comply with paragraph (a)(9), (a)(10), and (a)(11).

(c) The provisions of this section shall apply to all cable television systems that commence operations on or after March 31, 1972, in a community located in whole or in part within a major television market. Systems that commenced operations prior to March 31, 1972, shall comply on or before March 31, 1977: *Provided, however*, That, if such systems begin to provide any of the access services described above at an earlier date, they shall comply with paragraph (a)(9), (10), and (11) of this section at that

time; *And provided, further*, That if such systems receive certificates of compliance to add television signals to their operations at an earlier date, pursuant to § 76.61(b) or (c), or § 76.63 (a) (as it relates to § 76.61(b) or (c)), for each such signal added, such systems shall provide one (1) access channel in the following order of priority—(1) public access, (2) education access, (3) local government access, and (4) leased access—and shall comply with the appropriate requirements of paragraphs (a)(4)-(7) and (a)(9)-(11) of this section with respect thereto.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-1575, 77-1648, 77-1662

FEDERAL COMMUNICATIONS COMMISSION,
AMERICAN CIVIL LIBERTIES UNION,
NATIONAL BLACK MEDIA COALITION, ET AL.,
Petitioners,

v.

MIDWEST VIDEO CORPORATION, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI ON BEHALF OF RESPONDENT MIDWEST VIDEO CORPORATION

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BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI ON BEHALF OF RESPONDENT MIDWEST CORPORATION

The Federal Communications Commission ("the Commission"), American Civil Liberties Union ("ACLU") and National Black Media Coalition, Citizens for Cable Awareness in Pennsylvania and the Philadelphia Community Cable Coalition (collectively referred to as "NBMC") have petitioned for Supreme Court review of a decision of the United States Court of Appeals for the Eighth Circuit (A 1-92) which set aside a Report and Order ("the Order") of the Commission (A 93-181) amending its rules requiring certain cable television systems to provide access channels and meet certain two-way, channel

capacity and equipment requirements.[1] For the reasons set forth below, Midwest Video Corporation ("Midwest") urges that the Petitions filed by the Commission, ACLU and NBMC each be denied.

I. BACKGROUND AND COUNTERSTATEMENT

Midwest had earlier challenged a Commission rule ("the mandatory origination rule") requiring cable systems with more than 3,500 subscribers to operate to a significant extent as a local outlet by cablecasting. While Midwest's challenge to that rule had been upheld by the Eighth Circuit,[2] this Court, by a closely divided vote, reversed the Eighth Circuit and sustained the Commission's authority to adopt the mandatory origination rule. *U.S.* v. *Midwest Video Corp.*, 406 U.S. 649 (1972) ("*Midwest I*"). That rule had been stayed by the Commission pending Supreme Court review, and even after this Court's *Midwest I* decision, the Commission never lifted its stay and ultimately repealed the rule.[3]

By the time of this Court's *Midwest I* decision, access channel, two-way, channel capacity and equipment rules applicable to cable systems in the 100 largest television markets had been adopted and were in effect.[4] Those rules were the predecessors of rules here in issue, but they were not applicable to Midwest because none of its cable systems were

[1] References to the access rules will hereinafter include references to the two-way, channel capacity and equipment rules because of the interrelationship between these requirements. See A 18-19, n. 21.

[2] *Midwest Video Corp.* v. *FCC*, 441 F.2d 1322 (1971).

[3] *Report and Order in Docket No. 19988*, 49 FCC 2d 1090 (1974).

[4] *Cable Television Report and Order*, 36 FCC 2d 143 (1972).

located in the top 100 markets. However, at the time the Commission repealed its mandatory origination rule in 1974, it adopted another rule ("the equipment availability rule") which became applicable on January 1, 1976 to cable systems which had more than 3,500 subscribers and which were not already subject to the access and related requirements. The equipment availability rule required cable systems to which it was applicable to make time available on their channels and have equipment available for use by members of the public but did not contain the detailed requirements of the access, two-way or channel capacity rules. The equipment availability rule was in effect for only a short time, from January to June 1976, when it was replaced by the access, two-way, channel capacity and equipment rules here in issue.[5] Midwest sought review of the access rules in this proceeding immediately after the rules were amended to become applicable for the first time to Midwest.

The Commission seeks to treat the access and related rules as a natural and logical outgrowth of the mandatory origination rule, and neither it nor ACLU in their Petitions describe how the access rules operate or how they differ from the mandatory

[5] Pursuant to a limited grandfathering provision in the access rules Section 76.254(f) (A 172)), they did not become fully applicable to Midwest until early 1977. Midwest challenged the Commission's authority to adopt the equipment availability rule in *Midwest Video Corp.* v. *FCC*, Case No. 75-1671 (8th Cir.), but before the case was argued, the equipment availability rule was repealed and merged into the rules now before the Court. Midwest accordingly dismissed its appeal and no decision on the validity of the equipment availability rule was ever rendered.

origination rule.[6] Since Midwest believes that the access rules use vastly different means to achieve totally different purposes from those involved in the mandatory origination rule, it is important at the outset to highlight the differences between the mandatory origination rule upheld by this Court in *Midwest I* and the access rules set aside by the Eighth Circuit in this proceeding. The principal differences are as follows:

1. While the mandatory origination rule did not require the dedication of a channel solely for origination and left to the cable operator's discretion where and when on his channels he would provide program origination, the access rules now before the Court require cable operators to set aside channels for public, educational, local government and leased access users.[7] The public access channel must be made

[6] NBMC in its Petition does attempt to describe the access rules (Pet. 9-13), but Midwest believes that its description requires the following clarifications or corrections. First, the paragraph beginning on p. 11 of NBMC's Petition may be read as indicating that the access requirements become applicable only on demand. At least one channel must be reserved for access irrespective of demand (Section 76.254(c) (A 171)) except in the limited number of situations where an existing cable system was, on the effective date of the amended rules, fully utilizing its activated channel capacity. A cable operator who, after the effective date of the rule, commenced providing a service other than access on his last available channel, whether or not any use was being made of that channel, was guilty of bad faith (A 145). Second, at p. 12 of its Petition NBMC states that when the channel reserved for access is not being so used, the cable system can use the channel for other broadcast or non-broadcast purposes. NBMC has, however, ignored the exception to Section 76.254(b), which specified that "at least one channel shall be maintained *exclusively* for the presentation of access programming ..." (emphasis supplied) (A 202). See also the Commission's discussion of this requirement at A 196-197.

[7] Section 76.254(a) of the rules (A 170).

available for noncommercial use by members of the public, and both it and the leased access channel must be made available to all comers on a first-come, nondiscriminatory basis.[8] While separate channels need not initially be assigned for each type of access use, the rules require, within the limits of the activated channel capacity of the system, the dedication of one channel solely for access purposes irrespective of demand,[9] the assignment of fulltime channels for each type of access when there is a demand therefor,[10] and the activation of additional access channels when specified usage criteria are met.[11]

2. While the mandatory origination rule imposed no channel capacity and two-way transmission requirements, the access rules require new cable systems to provide a minimum channel capacity of twenty channels and the technical capacity for two-way, non-voice communications.[12] Cable systems subject to the access rules are required to maintain one channel for access even though little or no use is being made of the channel and even if the cable operator desires to use the channel to increase program diversity by, for example, voluntarily originating his own programming or providing pay television programming.[13]

3. While the mandatory origination rule imposed no limitations on how the cable operator might recoup the costs he incurred for the use of his channels in providing originated program-

[8] Sections 76.256(d) (1) and (3) (A 173-174).

[9] Section 76.254(b) (A 202).

[10] *Ibid.*

[11] Section 76.254(d) (A 171).

[12] Section 76.252(a) (A 168). Top 100 market systems in operation prior to March 31, 1972 and other systems in operation by March 31, 1977, have until June 21, 1986 to comply with this requirement. Section 76.252(b) (A 169).

[13] Section 76.254(b) (A 202); Order ¶ 69 (A 145).

ming (e.g. through advertising or charges to programmers), the access rules specify that one public access channel must always be available without charge and that the educational and local government access channels must be made available without charge for five years from the date that they are first utilized.[14]

4. While the mandatory origination rule contained no limitations on how the cable operator might recoup his equipment and personnel costs and when he might schedule the working hours of his technicians, the access rules specify that no charge may be made for equipment, production or personnel costs for live public access programs not exceeding five minutes in length and that for longer public access programs, charges must be reasonable and consistent with the goal of affording users a low-cost means of television access.[15] The Commission has interpreted this rule to mean that even when charges for equipment and personnel might otherwise be made to public access users (such as for a presentation over five minutes in length), the cable operator may not charge the public access user for the use of playback equipment or the time incurred by cable company personnel if the tape or film can be played without further technical alteration to the cable system's equipment.[16] Moreover, the cable operator may not limit the use of access channels to normal business hours.[17] Cable operators must thus have equipment and personnel available or on call at their own expense to operate playback equipment for an

[14] Section 76.256(c)(1) and (2) (A 173).

[15] Section 76.256(c) (3) (A 173).

[16] *Memorandum Opinion and Order Denying Reconsideration of the Report and Order in Docket No. 20508 ("Reconsideration")*, ¶ 15(d) (3) (A 199-200).

[17] *Reconsideration.* ¶ 15(d) (2) (A 198-99).

unspecified but substantial number of hours beyond the normal workday.

5. While the mandatory origination rule left to the cable operator complete control over what programming would be provided on the cable system, the access rules specify that the cable operator shall have no control over the content of access programming except to the extent necessary to prohibit the transmission of lottery information and, for all but leased access channels, commercial matter.[18] Thus, the cable operator not only cannot make judgments about program quality and suitability (even though the programming on access channels may cause subscribers to disconnect their service or may evoke sanctions (including non-renewal) from the franchising authority), but if the access user is utilizing the cable system's last available channel, the cable operator cannot even prevent an access user from providing a service that duplicates a service the cable operator is already providing (such as recent motion pictures). Thus, even if the cable operator or another party is willing and able to provide such readily available non-duplicative programming as live sports programs distributed by satellite or a children's channel consisting of cartoons and other children's programming, the cable operator cannot displace an access user to present such varied programming. Furthermore, the cable operator cannot prevent access users from presenting

[18] Sections 76.256(b) and (d) (A 172-175). The rules also required the cable operator to adopt and enforce rules prohibiting obscene or indecent matter on access channels (Section 76.256(d) (A 173-75). This aspect of the rules was invalidated by the Eighth Circuit because it constituted prior restraint without sufficient procedural safeguards (A 75-77). The Commission is not challenging this aspect of the Court's decision (Pet. 15-16, n. 15), and the discussion of it by NBMC (Pet. 32-33) is unnecessary.

> types of programming which may subject the cable operator to civil or criminal liability, such as defamatory or obscene material.[19]

In short, the mandatory origination rule imposed an obligation on cable systems that was analogous to the type of obligations the Commission expects of broadcasters—to provide a locally-originated video service to their communities. The access rules, on the other hand, require cable systems to divest themselves from all control over the programming on their access channels and who may use them, forego the possibility of earning any revenue from the service provided on most access channels, and have equipment and personnel available or on call, in many instances without charge, at the whim of access users.

II. THE IMPORTANCE OF THE CASE

The Commission argues that this case "presents a question of great importance as to the Commission's capacity to implement its statutory mandate and integrate new media into the national communications structure" (Pet. 19). But a scant three and a half years ago, when the Commission repealed its mandatory origination rule, it recognized the futility of that rule:

> Quality, effective local programming demands creativity and interest. These factors cannot be mandated by law or contract. The net effect of attempting to require originiation has been expenditure of large amounts of money for

[19] The problems arising from the cable operator's potentiial liability for these kinds of programming are addressed by the Eighth Circuit at A 79-82.

> programming that was, in many instances, neither wanted by subscribers nor beneficial to the system's total operation. In those cases in which the operator showed an interest or the cable community showed a desire for local programming, an outlet for local expression began to develop regardless of specific legal requirements. During the suspension of the mandatory rule, cable operators have used business judgment and discretion in their origination decisions. For example, some operators have felt compelled to originate to attract and retain subscribers. Those decisions have been made in light of local circumstances. This, we think, is as it should be. *Report and Order in Docket No. 19988*, 49 FCC 2d 1090, 1105-06 (1974).

In the Order in this proceeding, the Commission specifically found that "while it would appear that the use of access channels is growing, in the vast majority of communities presently providing multiple channels for access use, these channels are at best sporadically programmed", (A 138) and in its Reconsideration, the Commission recognized that "even larger systems typically have difficulty finding access channel users" (A 191). Notwithstanding the Commission's willingness to leave decisions about program origination to marketplace forces and local circumstances, the Commission refused to follow a similar course of action with respect to access requirements:

> Were we at this stage of cable's evolution to leave the provision of channel capacity and access services entirely to the marketplace, such action could have the practical effect of providing a barrier to the growth of access services which we expect of cable. (A 156)

The Eighth Circuit correctly views these and related facts as questioning whether there was an adequate record before the Commission to support the adoption of the access rules and whether the Commission's action was arbitrary and capricious (A 82-91). These facts also demonstrate that this case is not of sufficient importance to warrant Supreme Court review. Thus, even if the access rules were not subject to the other infirmities discussed in the Eighth Circuit's opinion, the Commission's own findings in this proceeding demonstrate that there is no significant current demand for access channels. The Commission has also failed to explain why, even if any significant demand for access to cable systems existed, it would not be able to rely on the free play of market forces and the economic self-interest of cable operators to satisfactorily accommodate that demand, just as it ultimately concluded would be a satisfactory substitute for its mandatory origination rule.[20] This case therefore involves only the Commission's authority to impose burdensome requirements on an industry to promote a type of activity which does not exist on a large scale, which the Commission only hopes will develop in the future, and which, if it does develop, may well be accommodated by marketplace forces.

III. THE JURISDICTIONAL QUESTION

(a) The Court Below's Discussion of Objectives and Means Was Mandated by the Decisions of this Court.

The Commission, ACLU and NBMC urge that the Eighth Circuit's resolution of the jurisdictional

[20] Such a result would be particularly appropriate in view of the fact that the Commission (Pet. 7-10) argues that the access rules promote the same goals as the mandatory origination rule.

question conflicts with this Court's decisions in *U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) ("*Southwestern*") and in *Midwest I. Southwestern*, a case involving Commission regulation of the carriage of television signals by cable systems, upheld the Commission's authority to regulate cable television to the extent that it was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178. *Midwest I* applied the reasonably ancillary test to the Commission's authority to adopt rules not relating to the carriage of broadcast signals—in that case the requirement that certain cable systems originate their own programming. Both cases recognize that the basis for the Commission's authority over cable television is Section 2(a) of the Communications Act, 47 U.S.C. § 152(a).

The Commission (Pet. 7) and NBMC (Pet. 25) argue that the Eighth Circuit overlooked relevant statutory provisions, with the Commission urging that the Court failed to consider Section 2(a) and instead read the Commission as having sought to derive its regulatory power from the objectives it was pursuing and NBMC arguing that the Court never examined the relevant statutory sections relied upon by the Commission and this Court in *Midwest I*. This argument totally misconceives the opinion of the Eighth Circuit. While the Eighth Circuit did not discuss either Section 2(a) or the other statutory provisions relied on by the Commission in any detail,[21] there was no reason for it to do so since there

[21] The Court did refer to Section 2(a) when it quoted from this Court's *Midwest I* opinion at A 25. It discussed the statutory provisions relied on by the Commission at A 22-23, n. 25.

was never any dispute that Section 2(a) provided the jurisdictional base for the Commission's regulation of cable television or that the Commission's authority to adopt access rules was not specifically covered by the other statutory provisions it cited. What the Eighth Circuit held was that this Court itself in *Midwest I* recognized that "§ 2(a) does not in and of itself prescribe any objectives for which the Commission's regulatory power might properly be exercised",[22] and that therefore, in order for the regulations to meet the reasonably ancillary test, there must also be a nexus between the specific regulations adopted by the Commission and the provisions of the Communications Act relating to broadcasting.[23] The

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[22] 406 U.S. at 661.

[23] Another court has similarly understood the jurisdictional test derived from *Southwestern* and *Midwest I*:

> " . . . we think that the Commission must either demonstrate specific support for its actions in the language of the Communications Act or at least be able to ground them in a well understood and consistently held policy developed in the Commission's regulation of broadcast television." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 28 (1977), *cert. denied* 98 S.C. 111 (1977) ("*Home Box Office*").

See also *National Association of Regulatory Utility Commissioners v. FCC*, 533 F. 2d 601, 612 (D.C. Cir. 1976) ("*NARUC II*").

The Commission (Pet. 12-13, n. 10) seeks to create the erroneous impression and ACLU explicitly argues (Pet. 11-12, n. 9) that based upon *American Civil Liberties Union, Inc. v. FCC*, 523 F.2d 1344 (9th Cir. 1975) (*ACLU*) and *Brookhaven Cable TV, Inc. v. Kelley*, _____F.2d._____(2nd Cir. 1978) (*Brookhaven*) there is a conflict between the circuits over the extent of its jurisdiction over cable television under this Court's *Southwestern* and *Midwest I* decisions. *ACLU* upheld the Commission's denial of proposals that the Commission impose a complete system of common carrier regulation on access channels and limit the cable operator's own program origination efforts to one channel per system. In doing so, there was language in the opinion indicating that the 1972 access rules were reasonable.

Eighth Circuit's discussion of objectives and means therefore constituted its effort to determine whether there was a sufficient statutory nexus to support the Commission's assertion of jurisdiction. Thus, contrary to the Commission's argument, the Court's discussion of means and objectives was mandated by this Court's decision in *Midwest I* and did not result from any overlooking of Section 2(a), and contrary to NBMC's argument, the Court looked to specific statutory provisions to determine whether a satisfactory nexus existed.

But, as the Eighth Circuit noted (A 10, n. 14), there was no party before the Court in ACLU challenging the Commission's jurisdiction to issue access rules. Arguments of the kind relied upon by Midwest and accepted by the Eighth Circuit were therefore not before the Court in *ACLU* and were not decided in that opinion. In *Brookhaven*, the Court distinguished this case because it involved the imposition of common carrier obligations on cable systems. Moreover, in *Brookhaven*, the Court was simply upholding the Commission's application of a policy—that pay cable operations should not be subject to governmental rate regulation— which the Commission had adopted in 1968 with respect to pay television operations by broadcast stations. See *Fourth Report and Order in Docket No. 11279*, 15 FCC 2d 466, 547-48 (1968). Such a result is entirely consistent with the reasonably ancillary test. NBMC argues (Pet. 28-29) that not only *ACLU* and *Brookhaven*, but also *NARUC II* and *Home Box Office* are contrary to the Eighth Circuit's holding in this case. But *NARUC II*, utilizing in the same analysis of the Commission's jurisdiction as was utilized by the Eighth Circuit, 533 F.2d at 612, invalidated the Commission's effort to preempt from state public utility regulation the provision of two-way nonvideo communications on cable television access channels. *Home Box Office*, relying upon a similar analysis, invalidated Commission rules restricting the programming judgments of cable operators about what programs they might offer on their channels utilized to provide pay cable service. Thus, these cases support the Eighth Circuit's decision here.

(b) The Access Rules Do Not Meet the Reasonably Ancillary Test.

The Commission argues that it has in any event met the reasonably ancillary test of *Southwestern* and *Midwest I* because the access rules "were adopted for the express purpose of 'increasing the number of outlets of local self expression and augmenting the diversity of programs and types of services available to the public' " (Pet. 9). In *Midwest I* this Court found that, as applied to the mandatory origination rule, this purpose was "plainly within the Commission's mandate for the regulation of television broadcasting." 406 U.S. at 668. But there was nothing in the mandatory origination rule that was otherwise inconsistent with either the goals or means accorded to the Commission to regulate television broadcasting.[24] That is not the case here.

In *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973) ("*CBS*"), this Court upheld the Commission's refusal[25] to impose access obligations on broadcasters, noting the fact that "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations," 412 U.S. at 110, and that on several occasions the Commission has ruled "that no private individual or

[24] See *e.g. Report and Statement of Policy re: Commission En Banc Programming Inquiry,* 20 Pike & Fischer RR 1901 (1960).

[25] The Commission decisions which were affirmed in *CBS* were based on the same statutory considerations as was the decision of this Court. See *Democratic National Committee,* 25 FCC 2d 216 (1970); *Business Executives Move for Vietnam Peace,* 25 FCC 2d 242 (1970). These decisions were not cast in terms of Commission discretion.

group has a right to command the use of broadcast facilities." 412 U.S. at 113. In doing so, the Court stressed the fact that Congress had on several occasions rejected proposals that would require broadcasters to give up editorial control over their facilities and open their microphones to all comers. 412 U.S. at 105-09. Of equal importance, the Court also recognized that implementation of a right of access scheme would raise serious Constitutional problems:

> The Commission's responsibilities under a right of access system would tend to draw it into a continuing case by case determination of who should be heard and when. Indeed, the likelihood of governmental involvement is so great that it has been suggested that the accepted constitutional principles against control of speech content would need to be relaxed with respect to editorial advertisements. To sacrifice First Amendment protections for a speculative gain is not warranted, and it is well within the Commission's discretion to construe the Act so as to avoid such a result. [footnotes omitted] (412 U.S. at 127)

Thus, the cable television access rules are contrary to an important broadcast regulatory goal of according significant discretion to broadcasters to determine what programming will be provided over their facilities.[26]

[26] *See also Straus Communications, Inc. v. FCC,* 530 F.2d 1001 (D.C. Cir. 1976); *Writers Guild of America West, Inc. v. FCC,* 423 F. Supp. 1064 (C.D. Cal. 1976), appeal pending. The Commission tries to avoid the force of this argument by

The access rules also require cable systems to operate as communications common carriers on their access channels—a situation that did not exist with the mandatory origination rule.[27] In light of the language in Section 3(h) of the Communications Act, 47 U.S.C. § 153(h), that a person "engaged in radio broadcasting shall not ... be deemed a common carrier", the Eighth Circuit (A pp. 59-64) also concluded that the access rules imposed a means of regulation on cable

asserting that *CBS* merely affirmed the Commission's discretion to decline to adopt a right of access policy applicable to broadcast stations. But as the discussion above and the Court's full opinion in *CBS* make clear, the Commission was affirmed because of clear indications of Congressional policy and because of Constitutional considerations which would raise very severe problems for the Commission if it were now to seek this Court's approval of a mandatory right of access requirement applicable to broadcast stations.

[27] The Commission does not in its Petition contest the fact that the access rules require cable systems to operate as common carriers on their access channels, and indeed it could not do so. There are two basic tests for what constitutes communications common carriage—first, that a party hold itself out as willing to serve all members of the public indifferently, *National Association of Regulatory Utility Commissioners* v. *FCC*, 525 F.2d 630, 641 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976), and second, that the customer, and not the carrier, determine what will be transmitted, *National Association of Regulatory Utility Commissioners* v. *FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976). Sections 76.256(d)(1) and (3) (A 173-74) of the Commission's rules require cable systems subject to the access rules to meet the first of these tests, and Section 76.256(b) (A 172-73) requires them to meet the second.

NBMC does contest the Court's conclusion that the access rules impose common carrier obligations (Pet. 27-28, n. 13), but the factual premises of its argument are erroneous. Access programming does not have third priority on cable channels after broadcast signals and pay cable programming. One channel must from the outset be dedicated solely to access (§ 76.254(b) (A 202)), and the Commission will refuse to authorize the commencement of operation of new systems or the additon of

systems that went beyond the types of regulation the Commission might impose on broadcasters.[28] This conclusion was plainly correct in light of the specific language on Section 3(h), this Court's discussion of Section 3(h) in *CBS*, 412 U.S. at 107-08, and the failure of Congressional efforts to impose common carrier obligations on broadcasters and constituted a further reason why the access rules were not consistent with the reasonably ancillary test for determining the extent of the Commission's jurisdiction over cable systems.

new signals to existing cable systems if their activated channel capacity is insufficient to provide at least one full channel for access programming. Order, ¶ 64 (A 139-41). The operating rules cable systems are required to adopt explicitly require first-come, non-discriminatory access and preclude program content control (§§ 76.256(d)(1) and (3), 76.256(b) (A 172-75). And cable operators are not limited to providing four access channels irrespective of channel capacity or demand but instead must increase the number of access channels without any limit other than the activated channel capacity of the system whenever specified usage criteria are met (§ 76.254(d) (A 171)).

[28] Another court has recognized that, under the reasonably ancillary test, the means of regulation the Commission applies to cable television must be consistent with the regulatory tools available to the Commission for the regulation of broadcast television:

> Moreover, given the similarities between cablecasting operations and broadcasting, we seriously doubt that the Communications Act could be construed to give the Commission "regulatory tools" over cable-casting that it did not have over broadcasting. *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 31 (D.C. Cir.), *cert. denied* 98 S.C. 111 (1977).

(c) There Is No Basis for Extending the Commission's Authority Over Cable Television Beyond that Consistent With Goals and Means Authorized for the Regulation of Television Broadcasting.

The Commission does not attempt to respond directly to those portions of the opinion of the Eighth Circuit discussing why the access rules are inconsistent with both the goals and means specified in the Communications Act for the regulation of television broadcasting.[29] Instead, it argues that even if the decision of the Eighth Circuit is determined to be consistent with *Midwest I*, the opinion raises an important issue which has not heretofore been addressed by this Court—whether the Commission's regulatory authority over cable television is limited by the nature of its regulation in the broadcasting area (Pet. 10-13). The Eighth Circuit correctly concluded that that question was answered by *Midwest I* (A 24-31). The language of the plurality opinion in *Midwest I* quoted above concerning the absence ot regulatory objectives in Section 2(a), followed by this Court's extensive analysis of the rule there before it and the provisions of the Communica-

[29] The Commission (Pet. 10-11, n. 8) and ACLU (Pet. 25) refer to language by this Court in *CBS*, raising the possibility that the Commission might conceivably at some future date devise a limited right of access that is both practicable and desirable (Pet. 10-11, n. 8). But the access rules are not limited in scope and the language cited in any event cannot be construed as constituting this Court's approval of a type of regulation that was not then before it. Similarly, the Commission intimates (Pet. 9-10, n. 6) that a footnote reference to the access rules in this Court's *Midwest I* decision constituted recognition of a "linkage" between origination and access requirements. But as the Eighth Circuit noted (A 33-34, n. 38), the access rules were not before this Court at that time, and no determination concerning their consistency with *Midwest I* can be read into that opinion.

tions Act, which led the Court to conclude that the mandatory origination rule was within the Commission's mandate for the regulation of television broadcasting, would otherwise have been unnecessary. This conclusion is reinforced by the close division of this Court in *Midwest I*, with only four Justices joining in the plurality decision, four Justices dissenting, and the Chief Justice occurring in the result but stating:

> Candor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts. The almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts. 406 U.S. at 676.[30]

[30] In fact, Congress has commenced an extensive review of cable television and whether additional legislation covering its regulation should be adopted. See Cable Television: Promise v. Regulatory Performance, Subcommittee Print prepared by the Staff for the use of the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, U.S. House of Representatives January 1976 (94th Cong., 2nd Session); Cable Television Regulation Oversight, Part I (Serial No. 94-137) and Part II (Serial No. 94-138), Hearings Before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 94th Congress, Second Session (1976); "Options for Cable Television Regulation," published in Option Papers, prepared by the Staff for use by the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 95th Cong., 1st Session, May 1977, Committee Print 95-13; Cable Television (Serial No. 95-32), Hearings before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation, U.S. Senate, 95th Cong., 1st Session (1977).

Moreover, in asking this Court to review whether the broadcast regulatory provisions of the Communications Act set limits on its regulatory authority over cable television, the Commission does not even suggest what other limitations might be applicable or where such limitations might be found.[31] Thus, it appears that the Commission is seeking a determination that it has virtually unlimited regulatory authority over cable television pursuant to Section 2(a), contrary to this Court's explicit determination to the contrary in the plurality opinion in *Midwest I*. The problems resulting from such a determination are convincingly described by the Eighth Circuit (A 32-53).

IV. CONSTITUTIONAL ISSUES

(a) First Amendment

The Eighth Circuit also concluded that the access rules raised constitutional questions which reinforced its views on the jurisdictional issue (A 65) and would have led it to find the rules constitutionally impermissible (A 74) had it been necessary to do so. It is hard to see how the Court could have reached any other conclusion. While the Commission's authority to regulate broadcast signal carriage has withstood First Amendment attack,[32] this Court has

[31] NBMC's jurisdictional argument is subject to a similar infirmity. It criticizes the Eighth Circuit's conclusion that cable regulations must be analogous to television broadcast regulations and argues that the Eighth Circuit should have focused on whether access is a legitimate means to insure that cable systems satisfactorily meet community needs (Pet. 26-27). But it does not address the relevance of *CBS* to the jurisdictional issue or indicate any source of limitation on the Commission's authority if the statutory provisions applicable to broadcasting may be ignored.

[32] See cases cited at the Commission's Pet. 14, n. 13.

recognized that the reception service of cable television systems and its origination service are "separate and different operations". *TelePrompTer Corp.* v. *Columbia Broadcasting System, Inc.*, 414 U.S. 394, 405 (1974) ("TelePrompter"). The provision of access services is not a reception service. In providing origination services such as access, cable systems, like newspapers, are entitled to the full First Amendment rights of all private media and not the more limited First Amendment rights applicable to broadcasters.[33] This Court has specifically held that

[33] In addition to the Eighth Circuit, the D.C. Circuit also has recognized that cable television systems, in their origination functions, should be treated like newspapers. *Home Box Office, Inc.* v. *FCC*, *supra*, at 44-46. The Commission, however, cites *Red Lion Broadcasting* v. *FCC*, 395 U.S. 367 (1969) for the proposition that this Court has distinguished for First Amendment purposes between the electronic broadcast media and the print media and then goes on to argue that cable systems should be regulated like broadcasters rather than newspapers because cable systems are heavily regulated, while newspapers are not (Pet. 14-15). See also ACLU Pet. at 20. In a similar vein, NBMC argues that if the Commission has jurisdiction to impose access rules, this would result in cable systems losing their status as private media and subject them to the same limitations on First Amendment rights as are applicable to broadcasters (Pet. 31-32). But as this Court's opinion in *CBS* makes clear, 412 U.S. at 101-03, the difference in treatment between broadcast media and the press does not turn on the extent to which each is regulated or whether one operates within the jurisdiction of the Commission while the other does not, but is instead a direct result of the scarcity of broadcast frequencies—a factor which does not affect the availability of cable television channels.

ACLU argues that cable channels are scarce for First Amendment purposes (Pet. 16, n. 11). Its argument is based upon an erroneous factual premise—that most cable television franchises are exclusive. In fact, the opposite is true. As noted in Rand Corporation study of cable television franchising, "[m]ost franchises are nonexclusive in the sense that the city reserves the right to franchise more than the operator within the same geogra-

an enforceable right of access to newspaper violates the First Amendment because "the cost in printing and composing time and materials and in taking up space... could be devoted to other material the newspaper may have preferred to print" and because a "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256-57 (1974) (*Tornillo*).[34] Moreover, even as to broadcast media, the imposition of access

phic area." Johnson, Leland L. and Botein, Michael, *Cable Television: The Process of Franchising*, (Rand Corporation, March 1973, No. R-1135-NSF) at p. 29. ACLU's argument is also legally incorrect. It is technologically possible to increase the number of cable television channels almost ad infinitum simply by installing additional cables. While there are economic constraints in such an approach, just as there are economic constraints involved in starting a new newspaper, those kinds of restraints have not been considered constitutionally relevant. See *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 247-256 (1974) and *Home Box Office*, 567 F.2d at 46. ACLU also argues (Pet. 22-23) that cable systems are analogous to common carriers and that it does not violate First Amendment rights to require carriers to carry the public's messages. But the Commission has never attempted to base its regulation of cable systems on its common carrier authority, so that question is not properly before the Court. Moreover, any effort to do so would, as the Eighth Circuit recognized (A 62), be contrary to *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583 (1926).

[34] ACLU asserts (Pet. 25-26) that government involvement in administering the access rules would be minimal if the increased channel capacity requirements of the access rules were enforced and seeks also to analogize the access rules to time, place and manner regulations (Pet. 15). *Tornillo* effectively answers both of these contentions. Newspapers can more easily increase their pages than can cable operators increase their channels, but that factor did not save the Florida right of access law. Nor did the Court in *Tornillo* consider the right of access requirement there before it, which was much less burdensome than the cable television access rules, to be a mere time, place and manner regulation.

requirements would, as recognized by the Eighth Circuit (A 73), be of doubtful constitutional validity both in light of this Court's discussion in *CBS* of the Congressional intention not to impose common carrier obligations on broadcasters, 412 U.S. at 105-09, to accord them wide discretion in the issues they treat, 412 U.S. at 124-125, and the manner of treating them, and in light of this Court's recognition of the government involvement that would be required to administer a right of access on broadcast facilities. 412 U.S. at 126-27.

The Commission argues (Pet. 13-14) that the Eighth Circuit's analysis is contrary to *Midwest I* in rejecting the nexus between broadcast signal transmission and cablecasting and the interdependencies between the retransmission and origination functions of cable systems.[35] This argument is startling in light of the Commission's argument that this Court should review whether any nexus with broadcast regulation is required in order for the Commission to support its jurisdiction over cable television (Pet. 10-11). Apparently it is the Commission's position that for First Amendment purposes cable systems must be treated as broadcasters because of the nexus between broadcast signal retransmission and cablecasting but that no similar nexus to the Commission's broadcast regulatory authority is necessary to support its jurisdiction. But even if it were possible to explain away this inconsistency, the only reason specified by the Commission for requiring such a nexus for First Amendment purposes would be to justify an

[35] ACLU makes a similar argument (Pet. 19). Aside from ignoring this Court's decision in *TelePrompTer*, a similar argument was also rejected in *Home Box Office*, 567 F.2d at 45, n. 80.

otherwise impermissible limitation on speech. But limitations on speech, when permissible at all, require substantial justification, such as regulation of a scarce public resource which justifies limitations on the First Amendment rights of broadcasters, and no such justification has been shown here. Cf. *United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968).

(b) Due Process

Finally, the Commission seeks to dispose of the Eighth Circuit's discussion of the due process issue (A 77-82) in a footnote (Pet. 16-17, n. 17), arguing in substance that, based upon this Court's *Midwest I* decision, there can be no confiscation in violation of the due process clause if the access rules are within the Commission's jurisdiction. But the mandatory origination rule before the Court in *Midwest I*, while burdensome, did not preclude a cable operator from recovering the costs he might incur in complying with the rule and did not require the dedication of his property to public purposes. The cable operator had considerable discretion in how to meet its requirements, how much time to provide, and how to recoup his costs, such as through advertising or the sale of channel time. The access rules, on the other hand, require the cable operator to dedicate a minimum of three channels to public use without compensation. Such a requirement is clearly contrary to such cases as *U.S.* v. *Kansas City Life Insurance Co.*, 339 U.S. 799 (1950) and *U.S.* v. *Causby*, 328 U.S. 256 (1946), cited by the Eighth Circuit, as well as *Eyherabide* v. *U.S.*, 345 F.2d 565 (Ct.Cl. 1965).

V. CONCLUSION

For the reasons set forth above, this case is not sufficiently important to warrant Supreme Court review and in any event it correctly applied the relevant jurisdictional, First Amendment and due process tests established by this Court to the situation before it. This Court should therefore deny the Petitions for the Writs of Certiorari.

Respectfully submitted,

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Date: June 2, 1978

Nos. 77-1575, 77-1648 and 77-1662

In the Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

MIDWEST VIDEO CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A.)[1] is reported at 571 F.2d 1025. The orders of the Federal Communications Commission (Pet. Apps. B and

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* Together with No. 77-1648, *American Civil Liberties Union* v. *Federal Communications Commission et al.*, and No. 77-1662, *National Black Media Coalition, et al.* v. *Midwest Video Corporation, et al.*

[1] "Pet. App." refers to the appendix to the petition in No. 77-1575.

C) are reported at 59 F.C.C. 2d 294 and 62 F.C.C. 2d 399.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1978. The petition in No. 77-1575 was filed on May 4, 1978; the petition in No. 77-1648 was filed on May 19, 1978; and the petition in No. 77-1662 was filed on May 22, 1978. Jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has statutory authority to promulgate rules requiring certain cable television systems (1) to have the capacity to provide at least 20 channels; (2) to provide access to third parties on channels or parts of channels not being used by the system for its regular services, and (3) to make available certain equipment and facilities to those third parties.

2. If so, whether such rules are consistent with the First and Fifth Amendments.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The First and Fifth Amendments are set forth at the end of the Commission's petition. The pertinent statutory provisions are set forth at Pet. App. E, pp. 209-211. The pertinent regulations are set forth at 47 C.F.R. 76.252 *et seq.* and Pet. App. B, pp. 168-176; Pet. App. C, pp. 202-203.

STATEMENT

The history and details of the complex rules established by the Federal Communications Commission's

Report and Order in Docket 20508, 59 F.C.C. 2d 294 (Pet. App. B) (*"1976 Report"*) are fully set forth in the *1976 Report*, the opinion of the court of appeals (Pet. App. A), and the petitions filed to review the court of appeals' judgment. We summarize only some aspects of particular significance to the present petitions that may not be readily apparent in the foregoing documents.

1. The 1976 Report.

Although the court of appeals focused almost exclusively on the third-party access rules, the *1976 Report* promulgated three related but distinct groups of rules—(1) channel capacity rules, (2) access rules, and (3) equipment availability rules. While all of these serve related objectives, in our view each group presents substantially different considerations for purposes of statutory and constitutional analysis.

The channel capacity rules generally require cable systems with 3,500 or more subscribers—only a part of all present cable systems—to have the capacity to provide 20 different channels over which the cable operator can transmit communications. To minimize the burdens of requiring reconstructing of existing systems with lesser capacity, the Commission in the *1976 Report* repealed its previously established 1977 deadline and permitted most existing systems until 1986 to comply, in order to allow most reconstruction to occur in the course of normal rebuilding or replacement (Pet. App. B, pp. 148-161).[2] The capacity

[2] Furthemore, the Commission declined to impose any requirement that a system operator install equipment enabling the reception of 20 channels by his subscribers, most of whom,

rules also require cable systems to develop a capacity for two-way nonvoice communications (Pet. App. B, pp. 124-134).[3]

As we read the *1976 Report*, the access rules provide, in effect, that a cable system must allow four groups (the public, educational authorities, local governments, and paying lessors) to use available channels of the system that are not being used by the system for its own broadcast retransmission or origination services (Pet. App. B, pp. 139-143, 169-171). Thus, the rules do not require the system to displace its own existing services in favor of providing access with the possible exception of the system's automated time and weather services (Pet. App. B, p. 143, n. 19; see n. 10, *infra*). The rules also permit the system operator to combine access services on the same channel where demand permits; thus, if demand for access services can be satisfied on one channel, the rules permit the operator to provide only one channel for those purposes (Pet. App. B, pp. 140-141, 170).[4]

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without such equipment, can receive only 12 cable channels on their television sets (Pet. App. B, pp. 132-138).

[3] Two-way nonvoice communication facilities permit a subscriber to communicate with the cable system. Such systems have not yet been greatly developed, but the technical possibilities include systems whereby a subscriber may order and receive books, visual materials or other information on his television set (see, generally, Pet. App. B, pp. 124-131).

[4] The rules present a number of other questions concerning the administration of the access rules that are not in our view clearly resolved by the *1976 Report*. The *1976 Report* acknowledges that fact (Pet. App. B, p. 148):

> [T]he administration of the composite access channel approach will undoubtedly present many difficulties. We shall, after some experience with these new rules has been gathered, issue a primer on various matters respecting our access channel obligations by which we hope to further clarify our position on these matters. We shall also administer our approach in a flexible manner and shall not hesitate to revisit this entire area should our experience dictate that our public interest goals are not being met.

The equipment availability rules provide that each system of 3,500 or more subscribers "shall have available equipment for local production and presentation of cablecast programs other than automated services and permit its use for the production and presentation of public access programs" (Pet. App. B, p. 172). They also provide that for programs exceeding five minutes in length the system operator can impose reasonable charges for "equipment, personnel, and production of public access programming." 47 C.F.R. 76.256(c)(3); Pet. App. B, p. 173.

2. The Court of Appeals Opinion.

The court of appeals held, first, that all the rules promulgated by the *1976 Report* exceeded the Commission's statutory authority. The basis for that conclusion is not clear (see Pet. App. A, pp. 20-64). The court appears to have concluded that, regardless of the objectives of the rules, they were not reasonably ancillary to the Commission's jurisdiction over television broadcasting, and therefore exceeded the jurisdictional limits imposed by this Court in *United States* v. *Midwest Video Corp.*, 406 U.S. 649, and *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, be-

cause they imposed burdens on cable systems that the court believed to be excessive and of doubtful merit and that the Commission had not imposed on television broadcasters.

Having held the rules to have been beyond the Commission's jurisdiction, the court of appeals expressed at some length its view that the rules in any event would violate the First and Fifth Amendments (Pet. App. A, pp. 64-82) although the court expressly declined to rest its decision on constitutional grounds (*id.* at 64). The court concluded that the rules would deprive cable operators of control of communications transmitted on their facilities in violation of the First Amendment principles set forth in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (Pet. App. A, pp. 71-74) and that they also imposed upon cable operators impermissible censorship obligations with respect to indecent or obscene materials (*id.* at 75-77). The court also "suggested" (*id.* at 77, 78-79) that the rules constituted a taking of property for public use without compensation in violation of the Fifth Amendment.

Finally, the court, also without deciding, raised a number of questions about the adequacy of the Commission's rationale and the record support for its rules, and stated (Pet. App. A, p. 91) that "it is at best doubtful that a court could avoid finding [the record] reflective of agency action arbitrary and capricious."

3. The Petitions.

The Commission, petitioning in No. 77-1575, seeks this Court's review of the court of appeals' jurisdictional and constitutional rulings. The Commission does not, however, seek review of the court's invalidation of those provisions in the rules requiring cable operators "to exercise prior restraint of obscenity [or indecency]" over access channels (Pet. App. A, p. 72, n. 73, 75-77) since the Commission itself has instituted a review of those provisions. See Pet. No. 77-1575, pp. 15-16, n. 15.

Petitioners in No. 77-1662, *National Black Media coalition, et al.*, also seek review of the court of appeals' jurisdictional and constitutional rulings and generally support the Commission's position on those issues.

Petitioner in No. 77-1648, the *American Civil Liberties Union*, seeks review of the jurisdictional and constitutional issues, and also presents as an issue for review (Pet. No. 77-1648, p. 3), without further discussion or argument, "[w]hether [the *1976 Report*], insofar as it retreated irrationally and without justification from the channel capacity and access requirements of the 1972 Report, should be set aside as arbitrary, capricious, and contrary to constitutional right."

DISCUSSION

We support the Commission's petition for a writ of certiorari. We agree with the Commission that the court of appeals erred in holding that the Commission

exceeded its jurisdiction and in concluding that the rules would violate the First Amendment and in suggesting that they would violate the Fifth Amendment. We also agree with the Commission that the jurisdictional and constitutional questions are important and warrant this Court's review.

1. The court of appeals' conclusion that the Commission's rules exceeded its jurisdiction cannot be reconciled with this Court's decisions in *Midwest Video Corp.*, *supra*, and *Southwestern Cable Co.*, *supra*. In those cases this Court established that the basic source of the Commission's regulatory jurisdiction over cable television is Section 2(a) of the Communications Act, 48 Stat. 1064, as amended, 47 U.S.C. 152(a), which provides in pertinent part: "The provisions of this [Act] shall apply to all interstate and foreign communication by wire or radio." The Court emphasized that Section 2(a) gives the Commission broad and comprehensive powers over "all interstate * * * communication by wire or radio." *Midwest Video Corp.*, *supra*, 406 U.S. at 660-661; *Southwestern Cable Co.*, *supra*, 392 U.S. at 172-173.

In both cases, the Court found it unnecessary to decide the outer limits of the Commission's powers under Section 2(a) to regulate cable television because it concluded that the Commission's jurisdiction at least included powers that are "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting" (*Southwestern Cable*, *supra*, 392 U.S. at 178; *Midwest Video*, *supra*, 406 U.S. at 662-663) and that the rules at issue in those cases were reasonably ancillary to those responsibilities.

The elucidation and application of those principles in *Midwest Video* are controlling in this case. In *Midwest Video*, the Court upheld the Commission's jurisdiction to establish rules requiring cable systems to originate their own programs. The plurality opinion explained that the concept of "reasonably ancillary" jurisdiction is not limited to the establishment of rules designed to protect broadcasting stations, but "extends also to requiring CATV affirmatively to further statutory policies" (406 U.S. at 644), and, in particular, extends to rules designed to " 'further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services * * *' " (*id.* at 667-668).[5]

The channel capacity, access and equipment availability rules established by the *1976 Report* are designed to serve the very same statutory policies that the Court in *Midwest Video* held established the basis for the Commission's jurisdiction. For purposes of the Commission's jurisdiction, we can see no ground for distinguishing the rules at issue here from those

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[5] Cf. *Federal Communications Commission* v. *National Citizens Committee for Broadcasting*, No. 76-1471, decided June 12, 1978, upholding the Commission's rules prospectively prohibiting common ownership of broadcast stations and newspapers in the same community.

upheld in *Midwest Video*. The mandatory origination rules had no closer nexus to the services provided by broadcasters than the capacity, access and equipment rules; rather both were designed to require cable systems themselves " 'affirmatively to further statutory policies' " (406 U.S. at 664).

Indeed, to the extent that they differ, the rules here would seem to fall more clearly within the jurisdiction recognized by all of the Members of the Court in *Midwest Video*. The principal objection of the four dissenting Justices in that case was to the fact that mandatory origination rules imposed on cable operators functions and responsibilities entirely different from those which they had chosen to undertake. *Midwest Video*, *supra*, 406 U.S. at 677-681 (dissenting opinion). The dissenting opinion emphasized that "CATV is simply a carrier having no more control over the message content than does a telephone company" (*id.* at 680), and concluded that requiring such carriers to engage in program origination was so extreme a step that it should be left to Congress. The rules here, in contrast, impose carriage responsibilities that are not substantially different from cable television's traditional and chosen functions.[6]

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[6] Since the decision in *Midwest Video*, Congress has acted in several ways to confirm this Court's conclusion that the Commission's regulation of cable television is congressionally authorized. In the Federal Election Campaign Act of 1971, 86 Stat. 3, 7, enacted in 1972, Congress amended Section 315 of the Communications Act, 48 Stat. 1088, as amended, 47 U.S.C. (Supp. V) 315, which imposes on broadcasting stations equal time and fairness obligations, to provide in Section 315(c):

> For purposes of this section—
>
> (1) the term "broadcasting station" includes a community antenna television system; and
>
> (2) the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.

Most recently, in Pub. L. 95-234, 92 Stat. 33 (February 21, 1978), Congress amended 47 U.S.C. 503(b) to provide for forfeiture penalties for persons who willfully fail to comply with the terms and conditions of any "license, permit, certificate, or other instrument or authorization issued by the Commission"; the amendment expressly applies the penalty provisions to common carriers, broadcast licensees and "cable television operator[s]." Those actions confirm Congress' understanding that the Commission is to regulate cable television systems, and certainly do not reflect any congressional objection to the principle of imposing access obligations on such systems.

In short, the court of appeals' jurisdictional conclusion is contrary to the principles established in *Midwest Video* and *Southwestern Cable*. It is also contrary to the decision of the Ninth Circuit in *American Civil Liberties Union* v. *Federal Communications Commission*, 523 F. 2d 1344, upholding the first access regulations promulgated by the Commission in 1972.[7]

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[7] It is difficult to discern the precise basis of the court's jurisdictional conclusion in this case. The court appears to have concluded that the objectives of the rules are largely irrelevant to the jurisdictional issue (see Pet. App. B, pp. 28, 32-39, 46-48), but that conclusion is plainly at odds with *Midwest Video*. Beyond that, the court's holding appears to be based on its views that the access rules are unduly burdensome and unwise (*id.* at 44-50), that they constitute impermissible common carriage regulations (*id.* at 59-64), and

that the Commission did not and could not impose the same kind of regulations on broadcasters (*id.* at 54-59).

None of those views, even if correct, supports the court's jurisdictional holding. The wisdom of the rules and the assessment of their costs and benefits are matters for the Commission to decide; a reviewing court is limited to determining whether the Commission's rules are within its statutory jurisdiction to adopt and whether they are arbitrary or capricious —*i.e.*, whether they are "not rational and based on consideration of the relevant factors." *Federal Communications Commission* v. *National Citizens Committee for Broadcasting*, No. 76-1471, decided June 12, 1978, slip op. 26. While the court of appeals suggested, without deciding, that it is "doubtful that a court could avoid finding [the record] reflective of agency action arbitrary and capricious" (Pet. App. A, p. 91), that view was based on the court's conclusions concerning the alleged "insufficient [record] evidence of demand for access programs" and the "speculative roots of the present access rules" (*id.* at 86). The standard of judicial review reflected in that approach is contrary to the principles reaffirmed in *National Citizens Committee, supra*, indicating that the substantial evidence test is not applicable to rulemaking of this kind (slip op. 26) and that in such cases "complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)" (*id.* at 36).

The fact that the access rules can be viewed as a limited form of common carriage obligation (see discussion, *infra*, pp. 16-18) that the Commission has not imposed on television broadcasters—and perhaps could not, see 47 U.S.C. 153(h); but cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 113, 131—does not place them beyond the Commission's jurisdiction over cable television. For example, this Court in *Midwest Video* noted that the courts of appeals had correctly upheld the Commission's rules requiring cable systems to carry, upon request, the signals of broadcast stations into whose service area they bring competing signals (406 U.S. at 659, n. 17), and which also

2. While the court of appeals purported not to rest its decision on constitutional grounds, its clear expression of the view that the rules are unconstitutional makes it appropriate for this Court to consider the constitutional issues.

Whether the Commission's access rules violate the First Amendment is a question of some difficulty, in light of *Miami Herald Publishing Co.* v. *Tornillo*, *supra*, which held that government can not, under the First Amendment, compel a newspaper to publish the reply of a person whom the newspaper had attacked, even if the newspaper has monopoly power.

As a preliminary matter, however, it should be stressed that the difficult First Amendment questions presented by the access rules are not presented by the channel capacity rules. While the channel capacity rules were adopted in part to provide the capacity to meet access obligations, they also serve significant independent interests in the efficient and orderly development of what this Court in *Southwestern Cable* and *Midwest Video* recognized to be a dynamic industry.[8] Although the requirement that cable systems

impose a limited form of common carrier obligation similar to the obligation imposed here (see also discussion, *infra*, pp. 17-18). As a general matter, moreover, the regulatory means that are appropriate and permissible with respect to the broadcast medium are not necessarily identical to the means appropriate and permissible with respect to cable television.

[8] The channel capacity rules are analogous to requirements that broadcast licensees have certain minimum power capacity or that building permittees provide certain minimum parking

serving large numbers of people meet certain minimum physical capacity requirements does not impose the burden that the court below found constitutionally offensive—divesting the operator of control of what is communicated over his facilities—the court made no distinction between the different kinds of rules involved in declaring them all invalid.

With respect to the access rules themselves, we submit that the court below erred in finding them violative of the First Amendment. While the cable television industry has similarities to a number of other industries—broadcasters, common carriers, public utilities, and newspapers—it also has features that distinguish it from each of those others. Adjudging the constitutionality of a particular rule as applied to cable television requires an analysis of that rule in light of the distinguishing features of the industry.[9]

It is true that cable television is not subject to the physical spectrum limitations on which this Court relied in *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, in upholding

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facilities even though present demand does not require the full use of such capacities.

The equipment availability rules, although in themselves the same kind of physical capacity requirements as the channel capacity rules, are more closely tied to the access rules, since they require the availability of equipment for the use of access users.

[9] As the Court recently stated in *Federal Communications Commission* v. *Pacifica Foundation*, No. 77-528, decided July 3, 1978, slip op. 19: "We have long recognized that each medium presents special First Amendment problems."

the application of the Commission's fairness doctrine and personal attack rules to broadcast licenses. See also *Federal Communications Commission* v. *National Citizens Committee For Broadcasting*, No. 76-1471, decided June 12, 1978, slip op. 22. However, this Court only recently pointed out in *Pacifica Foundation*, *supra*, slip op. 20, that "the reasons for * * * [First Amendment] distinctions [between the broadcast and print media] are complex," rather than related solely to the physical limitations of the broadcast spectrum. From the standpoint of viewers and listeners, the similarities between cablecasting and broadcasting as media of expression all but eclipse the differences. And, for First Amendment purposes, "it is the right of the viewers and listeners, not the right of the broadcasters [or cablecasters], which is paramount." *Red Lion*, *supra*, 395 U.S. at 390.

Moreover, the access rule here is quite different from the statute invalidated in *Miami Herald*. In *Miami Herald* the Court concluded that a statute requiring a newspaper to publish a reply to one of its editorial attacks would not only force the paper to publish something it disagreed with but also would discourage newspapers from taking controversial stands and thus have the result that "political and electoral coverage would be blunted or reduced." 418 U.S. at 257. In contrast, the imposition of access obligations here is entirely unrelated to the content of what the cablecaster otherwise transmits. As the Court said in *National Citizens Committee*, *supra*

(slip op. 24): "Here the regulations are not content related; moreover their purpose is to promote free speech; not to restrict it."

The access rules in effect impose a limited form of common carriage obligation upon cable operators. The obligation imposed is limited because it does not require the operator to dedicate to common carriage any of the channels he is presently using for his own purposes, but only those that are available and unused.[10] It thus preserves his basic freedom to engage in the business of transmitting signals of his choice and does not subject him to full common carriage regulations under Title II, which would include tariff filings, rate regulation, and full dedication of facilities to common carriage.

We may assume that government could not impose even a limited form of common carriage obligation on the print media[11] but that assumption would not necessarily apply to the cable industry. It has never

[10] This is true with the possible exception, noted at p. 4, *supra*, of existing automated services such as time and weather channels, which the Commission in the *1976 Report* stated that it "generally believe[s] * * * should give way to access uses * * *" (Pet. App. B, p. 143, n. 19).

[11] On the other hand, it could reasonably be argued that a state could, for example, require a newspaper to offer its classified advertising services to the public on a non-discriminatory basis. Cf. *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376. Moreover, this Court has expressly held that a newspaper "may not accept or deny advertisements" in furtherance of an attempt to monopolize or restrain trade in violation of the antitrust laws. *Lorain Journal* v. *United States*, 342 U.S. 143, 156.

been doubted that government can impose common carriage obligations on telephone and telegraph carriers and can require them to carry messages that they might prefer not to. There are important similarities between cablecasting and telephone or telegraph carriage.

First, as we have noted, the four dissenting Justices in *Midwest Video* stressed that "CATV is simply a carrier having no more control over the message content than a telephone company" (406 U.S. at 680). While some cablecasters today originate or select some of their programming, the retransmission of broadcast signals or the transmission of programs designed for broadcast elsewhere is still the pervasive characteristic of the industry.

Second, these broadcast-related activities support an expensive system of distribution having the characteristics of a natural monopoly.[12] In contrast to the possibilities that exist in the print media for such devices as direct mailings or dissemination of pamphlets or handbills, there is no practical way to engage

[12] In significant respects a cable system is similar to a public utility; its operations require the placement of wires over or under the public streets involving substantial capital investment similar to that of other natural monopolies. Accordingly, most localities require a cable system to obtain a local government franchise before it can commence operations—an obligation that it is doubtful that a state could impose on a newspaper or magazine. See *Pacifica Foundation, supra*, slip op. 19-20. Indeed, the proposition endorsed by the court below that cable systems are not distinguishable from newspapers for First Amendment purposes would raise serious doubts as to the constitutionality of such local franchising regulations.

in limited or *ad hoc* cablecasting without access to the system.

Finally, the Commission has already imposed upon cable operators common carriage obligations that were before the Court in *Southwestern Cable* and that a plurality of this Court in *Midwest Video* expressly approved—namely the obligation to retransmit upon request the broadcast signals of broadcast licensees serving the same community as the cable system. See 406 U.S. at 659, n. 17. For First Amendment purposes, we see no significant distinction between that kind of common carrier obligation and the access rules approved here.

3. In our view there is no merit in the court of appeals' further suggestion (Pet. App. A, pp. 77-82) that the channel capacity, access and equipment rules constitute an unconstitutional taking of property for public use. While in some cases it may be difficult to draw the line between permissible regulation and an unconstitutional taking, and the question is one of "degree" (see *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415-416),[13] the relatively limited obligations imposed by these rules do not significantly impair the

[13] There Mr. Justice Holmes stated for the Court: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * [T]his is a question of degree—and therefore cannot be disposed of by general propositions." But see Mr. Justice Brandeis' dissenting opinion, 260 U.S. at 416-422. See also *Penn Central Transportation Co.* v. *City of New York*, No. 77-444, decided June 26, 1978.

operator's abilities to provide his own services and therefore are a regulation falling far short of a taking. This Court recognized as much in upholding the more burdensome mandatory origination rules in *Midwest Video* and rejecting similar arguments in that case. See 406 U.S. at 658, nn. 15 and 16.

4. Finally, we agree with the Commission, for the reasons stated in its petition (Pet. 17-19), that the statutory and constitutional issues presented for review are of substantial importance to the public and to the performance of the Commission's responsibilities.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 77-1575, 77-1648, 77-1662

FEDERAL COMMUNICATIONS COMMISSION,
AMERICAN CIVIL LIBERTIES UNION,
NATIONAL BLACK MEDIA COALITION, ET AL.,
Petitioners,

v.

MIDWEST VIDEO CORPORATION, ET AL.,
Respondents.

RESPONSE TO BRIEF FOR THE UNITED STATES ON BEHALF OF RESPONDENT MIDWEST VIDEO CORPORATION

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RESPONSE TO BRIEF FOR THE UNITED STATES ON BEHALF OF RESPONDENT MIDWEST VIDEO CORPORATION

On July 25, 1978, the United States filed its Brief in the above-referenced proceedings, urging that the petitions for a Writ of Certiorari be granted. Since the United States raises matters in its Brief to which Respondent Midwest Video Corporation ("Midwest") has not had an opportunity to respond, Midwest is submitting this response.[1]

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[1] Though in form a Brief in support of the Commission's Petition, the United States was a party to the proceedings in the Court of Appeals, and in substance its Brief is a late-filed Petition for a Writ of Certiorari, to which Midwest would ordinarily be entitled to file an Opposition. Midwest is filing simultaneously herewith a Motion for Leave to File Response to Brief of the United States.

I. STATUTORY AUTHORITY

The United States argues that the Court of Appeals conclusion that the Federal Communications Commission's ("the Commission") rules here at issue exceeded its jurisdiction cannot be reconciled with this Court's decisions in *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972) and *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). It argues that those rules "are designed to serve the very same statutory policies that the Court in *Midwest Video* held established the basis for the Commission's jurisdiction." (Br. p. 9) and that the mandatory origination rules before the Court in *Midwest Video* "had no closer nexus to the services provided by broadcasters than the capacity, access and equipment rules" (Br. p. 10) here at issue. This argument, it should be noted, is in marked contrast to the argument the United States put forth in its Brief to this Court in *Midwest Video,* where it argued that the rule then before the Court was closely related to the services provided by broadcasters:

> "Even if Commission regulation of CATV must be substantially related to regulation of broadcasting, the requisite relationship is present where, as here, the Commission attempts to require CATV operators, whose principal product is the retransmission of broadcast signals and who serve the same functions in many areas as broadcasters, to meet some of *the same basic standards of responsibility to the public that are imposed on broadcasters.*" (Emphasis supplied) Brief for the United States and the Federal Communications Commission (filed February 24, 1972), p. 8.

The Court of Appeals, in its Opinion (A. 20-64) and Midwest in its Brief in Opposition to Petitions for

Writs of Certiorari (Midwest Br. p. 14-17) have demonstrated that, in contrast, the access and related rules[2] go far beyond any basic standard of responsibility imposed on broadcasters.

In an effort to salvage its jurisdictional argument, the United States argues that Congress has acted in several ways to confirm this Court's conclusion that the Commission's regulation of cable television is Congressionally authorized (Br. pp. 10-11, n. 6). But the two examples cited simply result in cable systems and broadcast stations being treated in the same manner—a situation in no way contrary to the Court of Appeals view of the Commission's jurisdiction.[3]

In response to the Court of Appeals holding that the access rules impermissibly impose common carrier obligations on cable systems (A. 59-64), the United States concedes that "the access rules can be viewed as a limited form of common carriage obliga-

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[2] The United States also argues (Br. p. 3) that, if the Commission's access and related rules are divided into three parts for purposes of analysis, different considerations for purposes of statutory and constitutional analysis can then be discerned. The short answer to this argument is that, as the United States later concedes (Br. p. 14, n. 8), the equipment availability aspect of the rules is closely tied to the access aspects. With respect to the channel capacity rule, the Court of Appeals itself recognized that there may be aspects of that rule that are not tied to access, and it invalidated the channel capacity requirement only to the extent it relates to access (A. p. 18, n. 21).

[3] There is now under consideration in the Congress a complete rewrite of the Communications Act in H.R. 13015, introduced on June 7, 1978, and that proposal excludes cable television from federal regulation. Whether or not that proposed legislation is adopted in its present form, Congress will, in its consideration of Communications Act rewrite, be able to take such action as it deems appropriate in light of the Court of Appeals decision.

tion" (Br. p. 12, n. 7). However, it then argues that this fact does not place the rules beyond the Commission's jurisdiction over cable television because the mandatory signal carriage rules that were before this Court in *Southwestern Cable Co.* imposed a limited form of common carrier obligation and the regulatory means that are appropriate and permissible with respect to the broadcast medium are not necessarily identical to the means appropriate and permissible with respect to cable television. There are two basic weaknesses with this argument.

First, neither the Court of Appeals opinion nor Midwest's Brief takes the position that the Commission's regulatory means must be identical with respect to the broadcast medium and cable television. This point was implicitly recognized by this Court in *Southwestern Cable Co.*, where the mandatory carriage rules before the Court had no direct analogue in broadcast regulation. Nevertheless, the Commission's authority to adopt such a rule was affirmed because the rule was in furtherance of the Commission's authority to allocate broadcast facilities, establish the areas and zones to be served by broadcast stations, and promote the implementation of its broadcast allocation scheme. 157 U.S. at 173-178. In a footnote, the Court in *Southwestern Cable Co.* specifically noted that neither it nor the Commission considered the cable systems there before it to be common carriers. 157 U.S. at 169, n. 29. Moreover, as shown by the Court of Appeals in its opinion (A. 59-64) and Midwest in its Brief (Midwest Br. pp. 16-17), common carrier regulation of cable systems is not only not based on or ancillary to any broadcast provisions of the Communications Act, but common carrier regulation of broadcasters is specifically prohibited.

Second, the matter of whether the common carrier provisions of the Act provide a basis for Commission jurisdiction is in any event not ripe for review by this Court. The Commission did not rely on those provisions to support its jurisdiction either in the Report and Order adopting the access rules (A. 93-167), its opinion on reconsideration of that Report and Order (A. 182-202), its Brief or argument before the Court of Appeals, or its Petition for Writ of Certiorari. Difficult legal and policy questions would be raised if cable systems were to be regulated pursuant to the common carrier provisions of the Act. The Commission's current view that it must regulate common carriers pursuant to all of the statutory requirements of Title II of the Act and that it does not have the authority to waive various provisions of Title II was affirmed in *AT&T Co.* v. *U.S.*, 572 F.2d 17 (2nd Cir. 1978), and two Petitions for Writs of Certiorari to the Court of Appeals in that case are pending (Nos. 77-1540 and 77-1690).[4] Thus, if the Commission has the authority to require cable systems to engage in a common carrier activity, the Commission would have to reexamine the nature of its regulation to determine its consistency with the requirements of Title II. However, at least for the

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[4] In that proceeding, the United States has taken the position that, since the Commission's opinion can be read as subjecting the business entities there before the Commission to full Title II common carrier regulation for policy reasons rather than because such regulation was mandated by the Act, the issue of whether or not the Commission has the discretion to decline to apply full Title II regulation to some common carriers is not ripe for review. It is inconsistent for the United States to argue that that proceeding is not ripe for review but that the common carrier provisions of the Act might support the Commission's action here when the Commission has not even addressed the matter.

present the Commission has made it clear that, as a matter of policy, it does not intend to regulate cable systems as common carriers, *Cable Television Report and Order,* 36 FCC 2d, 143, 197 (1972), *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order,* 36 FCC 2d 326, 352 (1972), *aff'd. sub nom. American Civil Liberties Union, Inc.* v. *FCC,* 523 F.2d 1344 (9th Cir. 1975), and consideration of the common carrier provisions of the Act as the basis for Commission authority would therefore be premature and inappropriate.

II. FIRST AMENDMENT

The United States recognizes in its argument that the Court of Appeals resolution of the First Amendment issue turns on the applicability of *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), but it seeks to distinguish that case on several inconsistent and incorrect grounds, as follows.

First, it stresses the similarities of cable systems and broadcasters (Br. pp. 14-15), presumably in order to bring cable systems within the ambit of First Amendment restrictions applicable to broadcasters but not newspapers. But if for First Amendment purposes cable systems are analogous to broadcasters, then this Court's opinion in *Columbia Broadcasting System* v. *Democratic National Committee,* 412 U.S. 94 (1973), raises serious questions about whether access rules are consistent with the Commission's authority over broadcasters. The United States does not discuss that case, though it was specifically relied on by Midwest at pp. 22-23 of its Brief.

Second, the United States argues that the imposition of access obligations is unrelated to the content

of what the cablecaster otherwise transmits (Br. pp. 15-16). But this is not correct. As the United States recognizes (Br. p. 4), automated services such as time and weather services must give way to access. Moreover, there are other types of automated services which might have to be displaced. The Commission in its Report and Order here under review refers specifically to community information and consumer price lists and indicates that it will consider each such situation individually on its merits (A. 143, n. 19). Other types of automated services presently offered by cable systems include news, sports, and stock market information. Thus, the access rules can require either the displacement of various types of automated services the cable operator and its subscribers may prefer, or the Commission may be called upon to make judgments as to which type of speech is to be preferred. Moreover, even when present automated services are not displaced, reservation of one or more channels for access can prevent the cable operator and its subscribers from receiving other types of desirable programming. See Midwest Br. pp. 7-8. Satellite communications is only in its infancy, but already it provides to cable operators throughout the country the ability to receive sports, religious programming, pay cable programming, and additional television signals not otherwise available, and other types of services delivered by satellite are likely to develop and may be precluded from carriage on some cable systems because one or more channels are being utilized to provide required access services. The access rules thus do affect the content of what cable systems transmit "in taking up space that could be devoted to other material the [cable system] would

have preferred to [present]." *Miami Herald Publishing Co.* v. *Tornillo, supra,* at 256.

Third, the United States argues that, because there are important similarities between cablecasting and telephone or telegraph carriage, the government can require cable systems to carry messages they might prefer not to carry (Br. pp. 16-18). But the speech of telephone and telegraph companies is not restricted by carrying the messages of others since that is the very purpose for which telephone and telegraph companies construct their facilities. Cable companies, by way of contrast, do originate their own programs and have the same interest in the content of such originations as does any other medium of expression.

III. CONCLUSION

For the foregoing reasons and the reasons stated in its Brief in Opposition, Midwest urges that the Petitions for Writs of Certiorari be denied.

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Nos. 77-1575, 77-1648 and 77-1662

In the Supreme Court of the United States

OCTOBER TERM, 1978

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v.

MIDWEST VIDEO CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (App. 1-92)[1] is reported at 571 F.2d 1025. The orders of the Federal Communications Commission (App. 93-181, 182-206) are reported at 59 F.C.C. 2d 294 and 62 F.C.C. 2d 399.

[1] "App." citations refer to the appendix to the Federal Communications Commission's petition for a writ of certiorari (No. 77-1575). After the petitions were granted, the parties agreed not to file a joint appendix.

JURISDICTION

The court of appeals entered judgment on February 21, 1978. A stay of mandate was granted by order dated April 4, 1978 (App. 207-208). The Commission filed its petition for certiorari on May 4, 1978, within the allotted time, and invoked this Court's jurisdiction pursuant to 28 U.S.C. 1254(1). On May 19 and May 22, 1978, respectively, the American Civil Liberties Union and the National Black Media Coalition, *et al.*, also filed petitions for certiorari, and on July 25, 1978, the United States filed a brief in support of the Commission's petition. This Court granted all the petitions on October 2, 1978, and consolidated the three cases.

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has statutory authority to require certain cable television systems: (1) to have the capacity by 1986 to provide at least 20 channels of service; (2) to provide access to third parties if demand exists and there is sufficient activated channel capacity and (3) to make available certain equipment and facilities to those third parties for access purposes.

2. Whether the foregoing rules are consistent with the First and Fifth Amendments.

STATUTES AND REGULATIONS INVOLVED

Sections 1, 2(a), 3(h), 303(g), 303(r) and 307(b) of the Communications Act of 1934, 47 U.S.C.

151, 152(a), 153(h), 303(g), 303(r) and 307(b) are set forth at App. 209-211. Sections 76.13, 76.252, 76.254, 76.256, 76.258, and 76.305 of the Rules and Regulations of the Federal Communications Commission, 47 C.F.R. 76.13, 76.252, 76.254, 76.256, 76.258, and 76.305, are set forth at App. 168-176, 202-203.

STATEMENT

In May 1976 the Federal Communications Commission issued a *Report and Order in Docket 20508* (App. 93-181) (the "*1976 Order*") promulgating access, equipment availability, and channel capacity rules for cable television systems. The rules, which amended similar rules promulgated in 1972, require cable systems which have 3,500 or more subscribers (about 23% of all systems),[2] and which carry broadcast signals: (1) to have the capacity by 1986 to provide at least 20 channels for cable services; (2) to make available certain channels for third party access (to the extent that demand exists and that those channels are not needed by the operator for his own established broadcast retransmission or pay cable services; and (3) to make certain equipment and facilities available for access purposes.

On review, the United States Court of Appeals for the Eighth Circuit set aside the *1976 Order* on the ground that the rules were beyond the Commission's jurisdiction (App. 1-92). The court also expressed the

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[2] Of the 3911 systems in operation on September 1, 1977, 913 had more than 3,500 subscribers. *TV Factbook*, No. 47, Services Vol. at 73a (1978 ed.).

view that the rules violated the First and Fifth Amendments and were inadequately supported by the record.

On October 2, 1978, this Court granted petitions for a writ of certiorari filed by the Commission and two other parties, and supported by the United States.

A. Background of the 1976 Order.

In the 1960's, the Commission became concerned that the unregulated growth of cable television could have substantial adverse impacts on broadcast television, to the detriment of the public interest.[3] *First*

[3] "Cable television" is sometimes also referred to as "community antenna television" ("CATV"). CATV refers to systems that receive, amplify and retransmit television broadcast signals to the system's subscribers by wire or microwave. "Cable television" is a broader term that includes the broadcast retransmission function of CATV systems as well as the transmission of non-broadcast signals, and was adopted by the Commission in place of *Cable Television Report and Order (Docket 18397 et al.)*, 36 F.C.C. 2d 143, 144 n.9 (1972).

Since the Commission's regulation of cable television began in 1965, the industry has grown tremendously. Currently, there are more than 4,000 cable systems serving 12.9 million subscribers, or the equivalent of 17.6% of the nation's television homes. *Television Digest*, Vol. 18, No. 13, March 27, 1978 (totals as of January 1, 1978). Technological advances have continued to increase the "multichannel capacity" which enables cable systems to add to the number of outlets of communication and to increase the diversity of program and service choices. By September 1, 1977, 465 systems possessed 13 to 20 channel capacity; 501 systems had more than 20 channel capacity. *TV Factbook*, No. 47, Services Vol. at 73a-76a (1978 ed.). Today, systems of up to 80 channels are at least technically feasible, and the advent of laser technology may soon make channel capacity virtually limitless.

Report and Order in Docket 14895 et al., 38 F.C. 683, 713-714 (1965) (the "*1965 Order*"); *Second Report and Order in Docket 14895 et al.*, 2 F.C.C. 2d 725, 728 (1966) (the "*1966 Order*"). It therefore asserted jurisdiction over cable television and adopted rules restricting the signals that could be carried on cable systems.[4] When these "signal carriage" rules were challenged, this Court held that the Commission's statutory jurisdiction to regulate cable is based on Section 2(a) of the Communications Act of 1934, 47 U.S.C. 152(a), and extends at least to regulation that is "reasonably ancillary" to its regulation of the broadcast industry. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).[5]

Shortly after *Southwestern Cable*, the Commission concluded that it was in the public interest and within its statutory authority not only to regulate cable television so as to prevent adverse effects on broadcasting, but also "to requir[e] CATV affirmatively to further statutory policies." *Notice of Proposed Rule-*

[4] The Commission at first sought to regulate cable indirectly by placing restrictions on the activities of common carrier microwave facilities that served CATV systems. Later it began to regulate some systems directly, but only those that were served by microwave. By 1966, however, the Commission had concluded that it had statutory authority to regulate all cable systems directly. *1966 Order*, *supra*, 2 F.C.C. 2d at 728-734.

[5] The Court in *Southwestern Cable* did not rule upon the validity of the signal carriage rules, but, as noted in *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 659 n.17 (1972), those rules were subsequently and correctly upheld by the courts of appeals.

making and Notice of Inquiry in Docket 18397, 15 F.C.C. 2d 417, 422 (1968); see also *First Report and Order in Docket 18397*, 20 F.C.C. 2d 201 (1969) (the "*1969 Order*"). In particular, the Commission "recognize[d] the great potential of the cable technology to further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services." *1969 Order, supra*, 20 F.C.C. 2d at 202. The Commission therefore adopted a rule requiring all cable systems which had 3,500 or more subscribers, and which carried broadcast signals, to operate to a significant extent as outlets for local programs by requiring them to originate (or "cablecast")[6] some programs and to have available facilities for local production and presentation of programs.

This Court upheld the "mandatory origination" rule in *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972) ("*Midwest Video I*"). The Court expressly affirmed the Commission's determination that the concept of "reasonably ancillary" jurisdiction is not limited to the establishment of rules designed to protect broadcasting stations, but " 'extends also to requiring CATV affirmatively to further statutory policies' " (406 U.S. at 664) (plurality opinion),

[6] "Cablecasting" was defined as "programming distributed on a CATV system which has been originated by the CATV operator or by another entity * * *" as distinguished from the broadcast signals retransmitted over the system. *1969 Order, supra*, 20 F.C.C. 2d at 223.

and, in particular, extends to rules designed, as the Commission had stated, to " 'further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services * * *' " (*id.* at 667-668).

By the time of this Court's decision in *Midwest Video I*, the Commission, in a further effort to promote the statutory objectives of increasing outlets and augmenting choices, had adopted access and channel capacity rules. Thus, in 1972, the Commission promulgated rules requiring all cable operators in the top 100 television markets to build their systems with at least 20-channel capacity and to designate four of these channels for public, governmental, educational and leased access respectively. All cable systems commencing operations in the major markets after March 31, 1972, were to comply immediately, while those which had begun operating prior to that date were generally permitted until March 31, 1977, to comply. *Cable Television Report and Order (Docket 18397 et al.)*, 36 F.C.C. 2d 143, 189-198 (1972) (the "*1972 Order*") (reproduced at App. 212-217). That rule, the predecessor of the rules now under review, was upheld in *American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975).

In 1974, the Commission repealed its origination rule, concluding that, for the cable medium, access is a more appropriate, less burdensome and equally effective means of promoting statutory objectives. *Re-*

port and Order in Docket 19988, 49 F.C.C. 2d 1090, 1099-1100, 1104-1106 (1974) (the "*1974 Order*"). However, the Commission retained its equipment availability rule so that facilities would be available to third parties for the production of access programming. See *1974 Order*, *supra*, 49 F.C.C. 2d at 1106-1108.

B. The 1976 Order

As the Commission gained further experience with its access and channel capacity rules, it concluded that economic considerations—particularly those presented by the 1977 compliance deadline—warranted reconsideration of the rules. It therefore instituted two further rulemaking proceedings. The first, Docket 20363, resulted in an order cancelling the March 1977 deadline. *Report and Order in Docket 20363*, 54 F.C.C.2d 207 (1975) (the "*1975 Order*"). The second, Docket 20508, led to an order in which the Commission reaffirmed its access and channel capacity policies, but applied the rules to all systems with 3,500 or more subscribers, whether or not they were located within the major markets, and also relaxed its rules substantially. *1976 Order*, 59 F.C.C.2d 294 (App. 93-181). It is the *1976 Order* which is the subject of this litigation.[7]

Numerous comments were filed in the proceeding, and in its order the Commission responded at the

[7] The Commission's *1975 Order* has also been challenged in *National Black Media Coalition* v. *FCC*, No. 75-1792 (D.C. Cir.), a case held in abeyance pending the outcome of this proceeding.

outset to contentions that the basic concept of the access rules was outside its jurisdiction and was in any event unconstitutional. It concluded that the rules are within its statutory jurisdiction because they are designed to serve the very same objectives as the origination rules held to be within the Commission's jurisdiction in *Midwest Video I—i.e.*, " 'increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services.' " *Midwest Video I*, *supra*, 406 U.S. at 668. App. 103.

The Commission also rejected arguments that access requirements constitute impermissible common carrier regulation, stating that cable systems are "neither broadcasters nor common carriers within the meaning of the Communications Act." Rather, cable is a "hybrid" requiring "identification and regulation as a separate force in communications." App. 104, quoting the *1972 Order*, *supra*, 36 F.C.C.2d at 211. Therefore, the Commission said, "[s]o long as the rules adopted are reasonably related to achieving objectives for which the Commission has been assigned jurisdiction we do not think they can be held beyond our authority merely by denominating them as somehow 'common carrier' in nature. The proper question, we believe, is not whether [the rules] fall in one category or another of regulation * * * but whether [they] promote statutory objectives. We think they do." App. 104.

The Commission also concluded that its rules are consistent with the First Amendment. It stated that

in cablecasting as in broadcasting, "First Amendment values are furthered by 'an uninhibited marketplace of ideas' in lieu of 'monopolization of that market' by the government or a private broadcaster or cable owner." App. 105, quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).[8]

The rules promulgated by the 1976 Order operate generally as follows:

1. *Channel Capacity Rules.* The channel capacity rules require cable systems with 3,500 or more subscribers[9] to have the technical capacity to provide a minimum of 20 channels "available for immediate or potential use for the totality of cable services to be offered." 47 C.F.R. 76.252; App. 168. The rules permit most existing systems until 1986 to comply with this requirement in order to permit most additional capacity to be installed in the course of normal construction and replacement. App. 146-161, 168-169. The rules do not require cable operators to install converters enabling the reception of 20 channels by subscribers. Without such equipment, most subscribers now can receive only 12 channels on their

[8] The Commission also observed that although the cable access rules were not before it, this Court in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), discussed the possibility of a "limited right of access that is both practicable and desirable" and referred specifically to the cable access rules. App. 105 n.4; see 412 U.S. at 131.

[9] The 3,500-subscriber standard amended the "top 100 market" standard employed in the *1972 Order*. App. 105-106, 111-120.

television sets. App. 132-138.[10] The rules also require cable systems to develop a capacity for two-way non-voice communications. App. 124-130.

2. *Access Rules.* The access rules provide that, as of June 21, 1976, a cable system must allow four groups (the public, educational authorities, local governments and paying lessors) to use available channels of the system that the cable operator is not using for broadcast retransmission or pay programming services (47 C.F.R. 76.254; App. 139-143, 169-171). The rules do not require the system to displace those services in favor of providing access.[11]

[10] A converter is a relatively expensive (*i.e.*, $25-40 per unit) piece of equipment which, when installed on a cable subscriber's television set, allows him to receive more than 12 channels of cable programming—something which is otherwise impossible in most cases. See App. 132 n.11. Although the cable operator is not required to install converters, if a third party wishes to bear the expense of installing them in order to make a channel or channels available for access, then the cable operator must permit the installation. App. 136-139.

[11] Thus the rules provide that the system shall provide access "to the extent of its available activated channel capability". 47 C.F.R. 76.254; App. 169. In the *1976 Order* the Commission explained that "available activated channel capability" is determined by starting with "the number of usable channels actually provided to each subscriber's home," and subtracting "channels already programmed by the system operator for which a separate charge is made" and "channels used to provide traditional cable television service, *i.e.*, channels providing television broadcast signals * * *." App. 141-142. The Commission further stated (App.

The rules also provide that the system operator may combine all access services on one composite channel if the demand for such services can be satisfied in this manner. App. 140-141, 170. Systems in operation on June 21, 1976, that did not at that time have even one full channel available for access are permitted to provide access on "whatever portions of channels are available for such purposes."[12] 47 C.F.R. 76.254(c); App. 171. Existing systems that did have an unoccupied channel on June 21, 1976, and systems commencing operation after that date are required to "maintain at least one full channel for shared access programing" (*ibid.*).[13]

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143 n.19): "It is not our intention that established cablecast services provided by system operators be automatically displaced."

[12] Those portions would include "blackout time", which occurs as a result of the Commission's network non-duplication rule, whereby a broadcast station is entitled to demand that its network programming not be carried on a cable channel in the same service area. See 47 C.F.R. 76.92. See also App. 140 & nn. 17, 18.

[13] A number of questions concerning the administration of the access rules and the resolution of potential conflicts among competing channel uses are not clearly resolved by the *1976 Order*. The *1976 Order* acknowledged that fact (App. 148):

> [T]he administration of the composite access channel approach will undoubtly present many difficulties. We shall, after some experience with these new rules has been gathered, issue a primer on various matters respecting our access channel obligations by which we hope to further clarify our position on these matters. We shall also administer our approach in a flexible manner and shall not hesitate to revisit this entire area should our experience dictate that our public interest goals are not being met.

3. *Equipment Availability Rule.* The equipment availability rule provides that each system of 3,500 or more subscribers "shall have available equipment for local production and presentation of cablecast programs other than automated services and [shall] permit its use for the production and presentation of public access programs." 47 C.F.R. 76.256(a); App. 172. The rule also provides that, for programs exceeding five minutes in length, the system operator can impose reasonable charges for "equipment, personnel, and production of public access programming." 47 C.F.R. 76.256(c)(3); App. 173.

C. The Court of Appeals Decision

On review, the court of appeals set aside the channel capacity, access and equipment availability rules as being beyond the Commission's statutory jurisdiction (App. 1-92). The court asserted a number

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And in its order on reconsideration (App. 182-206) the Commission again emphasized the point (*id.* at 198):

> We have not included, beyond the specifications contained in Section 76.256 of the Rules, every detail of what these rules should contain, leaving cable operators some leeway to experiment with the details of the rules and to accommodate them, in a reasonable fashion, to local conditions. Questions as to the reasonableness of particular sets of rules should be referred to the Commission for resolution. Every effort will be made to resolve these questions on an informal basis, but more formal proceedings will be commenced if necessary.

of reasons in support of that conclusion. First, it stated that the Communications Act provides no "express basis for jurisdiction" over cable television (App. 24). It reasoned that the rules were not "reasonably ancillary" to the Commission's broadcast jurisdiction under the principles of *Southwestern Cable* and *Midwest Video I*, because the purpose of the access rule was neither to protect broadcasters nor "to require that cable systems do what broadcasters do * * *" (App. 28). In addition, the court concluded that the objectives of the rules, to increase outlets and programming choices, were essentially irrelevant to the jurisdictional issue (App. 32-50), and that the Commission's "ends" do not justify its "means."[14] App. 50-53. Finally, it concluded that the access rules contravened express jurisdictional limitations, because, in the court's view, the Commission could not impose access rules on broadcasters (App. 54-59) and because broadcasters cannot be regulated as common carriers under Section 3(h) of the Act, 47 U.S.C. 153(h) (App. 59, 64).

Having held the rules to have been beyond the Commission's jurisdiction, the court of appeals expressed at some length its view that the rules in any event would violate the First and Fifth Amendments (App.

[14] The court also stated that the Commission could not base its rules upon "futuristic visions" (App. 44), but must actually find evidence of "substantial national demand" for access services (App. 48). But even this would not confer jurisdiction (*id.* at n.54). Finally, the court expressed doubt that the rules were in the public interest (App. 49-50).

64-82), although the court expressly declined to rest its decision on constitutional grounds (*id.* at 64). The court concluded that the rules would deprive cable operators of control of communications transmitted on their facilities in violation of the First Amendment principles set forth in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (App. 71-74).[15] The court also "suggested" (*id.* at 77, 78-79) that the rules would constitute a taking of property for public use without compensation in violation of the Fifth Amendment.[16]

SUMMARY OF ARGUMENT

I

The Commission has statutory authority to promulgate the channel capacity, access and equipment availability rules under Section 2(a) of the Communications Act and principles established in *Southwestern Cable* and *Midwest Video I*. *Southwestern Cable* held that the Commission's jurisdiction to regu-

[15] The court also concluded that the rules would impose upon cable operators impermissible censorship obligations with respect to indecent or obscene materials (*id.* at 75-77). The Commission did not seek review of that conclusion since the Commission has instituted a review of those provisions dealing with obscene and indecent materials (77-1575 Pet. 15-16 n.15).

[16] The court, also without deciding, raised a number of questions about the adequacy of the Commission's rationale and the record support for its rules, and stated (App. 91) that "it is at best doubtful that a court could avoid finding [the record] reflective of agency action arbitrary and capricious."

late cable television is based on Section 2(a) and includes at least the authority to prescribe rules that are "reasonably ancillary" to the Commission's regulation of television broadcasting. *Midwest Video I* upheld the Commission's rules requiring cable systems to originate programs, and explained that the reasonably ancillary standard is not limited to the promulgation of rules designed to protect or directly affect television broadcasting; it also extends to rules, like the origination rule, designed to require cable systems themselves affirmatively to promote such statutory policies as increased outlets for community expression and programming choices for the public.

The rules under review are reasonably ancillary to the Commission's regulation of broadcasting in the very same sense as the origination rule upheld in *Midwest Video I*. Like the origination rule, they are designed to promote the statutory objectives of increased community outlets and programming choices; indeed they were adopted in large part as a less burdensome substitute for the now-repealed origination rule. They would also appear to fall more clearly within the jurisdiction recognized by all of the members of the Court in *Midwest Video I*, because the principal objection of the dissenters in that case to the origination rule was that it required cable systems, which are for the most part simply carriers of the signals of others, affirmatively to engage in an enterprise they had not chosen to undertake. The rules under review here, in contrast, impose a limited

form of carriage obligation that is similar to cable television's principal function.

II

The rules under review do not contravene the First Amendment rights of cable operators.

1. Although the court below did not separately analyze the different types of rules promulgated by the *1976 Order*, the channel capacity rules, requiring certain cable systems by 1986 to have the potential of transmitting 20 channels, do not deprive the cable operators of control over what is transmitted on his facilities. Those rules present no substantial constitutional question even under the court of appeals' analysis.

2. With respect to the access rules, the court of appeals erred in concluding that they violate the First Amendment by simple analogy to the question whether similar rules would be invalid as applied to newspapers, and by relying on *Miami Herald Publishing Co.* v. *Tornillo*, *supra*. A more particularized consideration of the characteristics of the rules and of the cable television industry supports their constitutionality.

First, the access rules impose a very limited obligation on cable operators that does not substantially impair their ability to use their facilities for their principal and traditional functions of broadcast retransmission and pay programming. Rather they impose a limited carriage-type obligation to provide access on channels that the operator is not using for

those services. Unlike the right of reply statute held invalid in *Miami Herald*, the obligation is content-neutral; it is not triggered by anything communicated over the system's facilities and therefore does not have the capacity to chill the operator's exercise of its own First Amendment rights.

Second, the access rules are designed to enhance what this Court has frequently held to be significant First Amendment interests, namely the "widest possible dissemination of information from diverse and antagonistic sources" (*Associated Press* v. *United States*, 326 U.S. 1, 20 (1945)) and "an uninhibited marketplace of ideas" (*Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969)).

Third, although it may be that such a limited common carriage obligation could not constitutionally be imposed on newspapers or other print media, there are significant differences between cable television and the print media and also significant similarities between cable television and communications common carriers and broadcasters upon whom similar obligations may be imposed. The particular characteristics of cable television make analogies to the print media inappropriate and support the constitutionality of the access rules.

Finally, the validity of the access rules is strongly supported by *Midwest Video I*, which noted with approval that the courts of appeals had upheld the Commission's earlier signal carriage rules, which, *inter alia*, also imposed a limited carriage obligation on cable systems; *i.e.*, the obligation to carry the signals of local broadcast licensees. For First Amendment purposes, the access rules here are not materially different from those signal carriage rules.

III

The court of appeals erred in suggesting that the rules under review constituted a taking of property in violation of the Fifth Amendment. Under principles recently reaffirmed in *Penn Central Transportation Co.* v. *New York City*, No. 77-444 (June 26, 1978), the relatively limited obligations imposed by these rules fall far short of a taking.

ARGUMENT

I

THE COMMISSION HAS STATUTORY AUTHORITY TO ADOPT ACCESS, EQUIPMENT AVAILABILITY AND CHANNEL CAPACITY RULES FOR CABLE TELEVISION SYSTEMS WHICH CARRY BROADCAST SIGNALS

The holding of the court of appeals that the Commission lacks statutory jurisdiction to promulgate the rules under review is contrary to this Court's decisions in *Southwestern Cable* and *Midwest Video I*. Those decisions established that the Commission's basic grant of jurisdiction over cable television is Section 2(a) of the Communications Act; that its authority to prescribe rules for cable television includes rules that are " 'reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting' " (392 U.S. at 178; 406 U.S. at 670); and

that such "reasonably ancillary" rules include not only rules designed to protect or affect the business of broadcast licensees but also those designed to require cable systems themselves affirmatively to promote such statutory policies as increased community outlets and programming choices. Those principles fully support the Commission's jurisdiction in this case.

A. Section 2(a) of the Communications Act Establishes the Commission's Jurisdiction Over Cable Television

Section 2(a) of the Communications Act, 47 U.S.C. 152(a), provides in pertinent part:

> The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio * * *.

In *Southwestern Cable* this Court held that Section 2(a) constitutes the Comission's basic grant of jurisdiction over cable television, which is undisputably "interstate * * * communication by wire or radio * * *." 392 U.S. at 168-169. See also *Midwest Video I*, *supra*, 406 U.S. at 662 and n.21. In so holding, the Court expressly rejected the contention, which the court below accepted (App. 22-24),[17] that neither

[17] With respect to the Commission's reliance on Section 2(a), the court of appeals stated only "Section 2 states those to whom the statute applies" (App. 22 n.25).

Section 2(a) nor any other section of the Act expressly conferred jurisdiction over cable television. The cable operators in *Southwestern Cable* had contended that because they were neither common carriers, subject to regulation under Title II of the Act, nor broadcasters, subject to Title III, their activities "elude[d] altogether the Act's grasp." 392 U.S. at 172. The Court, however, held to the contrary (*id.* at 172-173; footnotes omitted):

> We cannot construe the Act so restrictively. Nothing in the language of § 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. The section itself states merely that the "provisions of [the Act] shall apply to all interstate and foreign communication by wire or radio * * *." Similarly, the legislative history indicates that the Commission was given "regulatory power over all forms of electrical communication * * *." S. Rep. No. 781, 73d Cong., 2d Sess., 1. Certainly Congress could not in 1934 have forseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission," *F.C.C.* v. *Pottsville Broadcasting Co.*, [309 U.S. 134, 138 (1940)], that it conferred upon the Commission a "unified jurisdiction" and "broad authority." Thus, "[u]nderlying the whole [Communications Act] is recog-

nition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *F.C.C.* v. *Pottsville Broadcasting Co., supra,* at 138. Congress in 1934 acted in a field that was demonstrably "both new and dynamic," and it therefore gave the Commission "a comprehensive mandate," with "not niggardly but expansive powers." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 219 [1943]. We have found no reason to believe that § 152 does not, as its terms suggest, confer regulatory authority over "all interstate * * * communication by wire or radio."

See also *Midwest Video I, supra,* 406 U.S. at 660-661.

In both *Southwestern Cable* and *Midwest Video I,* however, the Court found it unnecessary to delineate the outer limits of the Commission's "comprehensive mandate" to regulate interstate communications by wire or radio, including those by cable systems, because it concluded that the Commission's jurisdiction at least included prescribing rules for cable television that are " 'reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting' " (392 U.S. at 178; 406 U.S. at 670).[18] In the present case

[18] In *Southwestern Cable* and *Midwest Video I,* the Court made clear that it was not holding that the Commission's jurisdiction was *limited* to prescribing rules reasonably ancillary to its responsibilities over television broadcasting; it

it is similarly unnecessary to decide the outer limits of the Commission's jurisdiction over cable because here, too, the rules are reasonably ancillary to the Commission's responsibilities over television broadcasting, as that concept was explained and applied in *Southwestern Cable,* and, particularly, in *Midwest Video I.* Indeed, they are ancillary in the very same sense as the rules upheld in *Midwest Video I.*

simply did not decide that issue. See *Southwestern Cable, supra,* 392 U.S. at 178: "We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes." See also *Midwest Video I, supra,* 406 U.S. at 662.

The Court's articulation of a reasonably ancillary standard appears to have been in response to possible concerns that the Commission's authority to prescribe rules for cable systems would not be confined by any statutory standards if it were based solely on the broad jurisdictional grant of Section 2(a), because the substantive provisions of the Act (Titles II and III) related specifically to common carriers and broadcasters respectively, and cable systems could not be precisely described as either. As the Court stated in *Midwest Video I, supra,* 406 U.S. at 661, "§ 2(a) does not in and of itself prescribe any objectives for which the Commission's regulatory power over CATV might properly be exercised." There is no basis for such concerns if cable rules can be measured by, and viewed as reasonably ancillary to, the statutory standards and policies governing television broadcasting, to which cable television is closely related. Although those statutory standards antedated both television broadcasting and cablecasting, they embody policies that are pertinent to both.

B. The Rules Under Review Are Reasonably Ancillary to the Commission's Responsibilities For the Regulation of Broadcast Television

In *Southwestern Cable*, the Court upheld the Commission's authority to prescribe rules for cable that are reasonably ancillary to the Commission's jurisdiction over television broadcasting in the context of rules designed to protect broadcasters by restricting the broadcast signals that cable systems retransmit to their subscribers.[19] In *Midwest Video I*, the Court applied the same principles to uphold rules requiring certain cable systems to perform more than their traditional function of receiving and retransmitting the signals of broadcasters—requiring them, *inter alia*, to originate programming produced by themselves or others. Although the origination requirement was not designed to protect television broadcasters, or even to affect them directly, the plurality opinion of the Court affirmed the Commission's view that its "reasonably ancillary" jurisdiction over cable television "is not limited to controlling the competitive impact CATV may have on broadcast services. * * * [W]e must agree with the Commission that its 'concern with CATV carriage of broadcast signals is not

[19] Those rules required cable systems to carry local broadcast signals, prohibited duplication of local broadcast programming, and prohibited importation of distant signals into certain markets. The Court did not pass on the validity of those rules, but as was noted in *Midwest Video I, supra*, 406 U.S. at 659, n.17, "[t]heir validity was, however, subsequently and correctly upheld by courts of appeals as within the guidelines of [*Southwestern Cable*]. See, *e.g., Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (CA 8 1968)."

just a matter of avoidance of adverse effects, but extends also to requiring CATV affirmatively to further statutory policies' [15 F.C.C. 2d 417, 422 (1968)]." 406 U.S. at 664. That opinion further stated (406 U.S. at 667-668):

> [T]he critical question in this case is whether the Commission has reasonably determined that its origination rule will "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services * * *." [Quoting from 20 F.C.C. 2d 201, 202 (1969).] We find that it has.

The Court also rejected contentions that the Commission could not require cable systems to provide services that they had not willingly undertaken to perform. The plurality opinion stated (406 U.S. at 670):

> The Commission is not attempting to compel wire service where there has been no commitment to undertake it. CATV operators to whom the cablecasting rule applies have voluntarily engaged themselves in providing that service, and the Commission seeks only to ensure that it satisfactorily meets community needs within the context of their undertaking.

It is also significant here that *Midwest Video I* further noted that the courts of appeals had correctly applied the reasonably ancillary standard established in *Southwestern Cable* to uphold the Commission's earlier "signal carriage rules," which, *inter alia*, re-

quire cable systems to carry the signals of local broadcasters located within the system's service area upon the broadcasters' request. 406 U.S. at 659 n.17.[20]

The principles stated in *Midwest Video I* control the jurisdictional issue in this case. The channel capacity, access, and equipment availability rules are designed to serve the very same objectives of increasing community outlets of expression and increasing programming choices as the origination rules upheld in *Midwest Video I*, and the Commission's judgment that they will promote those objectives is a reasonable one.[20a] Indeed, as the *1972 Order* and *1976 Order* reflect, the rules at issue here were designed in large part as a substitute for the origination rule (which was repealed in 1974) that would be less burden-

[20] The Chief Justice concurred in the result in *Midwest Video I*. While he expressed the view that the Commission's imposition of an origination requirement "strain[ed] the outer limits" of its jurisdiction, the Chief Justice also acknowledged that "Congress has created its instrumentality to regulate broadcasting [and] has given it pervasive powers." 406 U.S. at 676. In addition, the Chief Justice "agree[d] with the plurality's rejection of any meaningful analogy between requiring CATV operators to develop programing and the concept of commandeering someone to engage in broadcasting. * * * [W]hen [cable operators] interrupt the [broadcast] signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission." *Ibid.*

[20a] As *Midwest Video I* noted (406 U.S. at 669-670), those policies and objectives are set forth in a number of provisions of the Communications Act, including Sections 1, 303(g) and 307(b), 47 U.S.C. 151, 303(g) and 307(b).

some on cable operators than the origination rules and yet would serve largely the same objective (App. 103-104; *1974 Order*, *supra*, 49 F.C.C. 2d at 1099-1100).[21]

Moreover, to the extent that they differ, the rules here fall more clearly within the jurisdiction recognized by all Members of the Court in *Midwest Video I*. The principal objection of the four dissenting Justices in that case was to the fact that the origination rule imposed on cable operators functions and responsibilities that were different from those they had chosen to undertake. 406 U.S. at 677-681. The dissenting opinion emphasized that "CATV is simply a carrier having no more control over the message content that does a telephone company" (*id.* at 680), and concluded that requiring such carriers to engage in program origination was so extreme a step that it should be left to Congress. The rules here, in contrast, impose carriage requirements that are far closer to cable television's traditional retransmission functions than is program origination. See also *American Civil Liberties Union* v. *FCC*, 523 F.2d 1344, 1351

[21] Furthermore, it is significant that *Midwest Video I* upheld not only the rule requiring cable systems to originate programming but also the related rule requiring them to make available facilities for local production and presentation of programs. 406 U.S. at 653-654. Although the court below did not separately analyze the different rules here under review for either jurisdictional or constitutional purposes (see also discussion, page 35, *infra*), the equipment availability rules not only serve the same objectives as the rules upheld in *Midwest Video I*, but also constitute the same means employed for that purpose as that utilized in the rules upheld in that case.

(9th Cir. 1975), upholding the access rules promulgated by the *1972 Order*.

The grounds asserted by the court below for reaching a contrary result conflict squarely with *Midwest Video I*. The court below held that the Commission's objectives were essentially irrelevant to the jurisdictional issue, but *Midwest Video I* established quite the contrary.[22] The court relied on the fact that the rules do not protect broadcasters, and have no "nexus" with the services provided by broadcasters (App. 28); but the origination rules were not designed to protect broadcasters, and had no closer "nexus" to services provided by broadcasters than the rules at issue here.[23]

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[22] The court below purported to distinguish *Midwest Video I*'s elucidation of the Commission's jurisdiction in terms of statutory objectives by stating that that discussion only "applied to origination," and not to access rules (App. 35). But this Court's discussion of the general principles governing the Commission's jurisdiction was plainly not limited to the particular rules at issue in *Midwest Video I*.

[23] Rather, both sets of rules were designed to require cable systems themselves " 'affirmatively to further statutory policies' " (406 U.S. at 664). Moreover, the explanation in *Midwest Video I* of the nexus between the origination rules and television broadcasting applies with equal force to the rules presently under review. It was there stated (406 U.S. at 670 n.29):

> Respondent asserts that "it is difficult to see how a mandatory [origination] requirement * * * can be said to aid the Commission in preserving the availability of broadcast stations to the several states and communities." * * * Respondent ignores that the provision of additional programming outlets by CATV necessarily affects the fairness, efficiency, and equity of the distribution of television services. We have no basis, it may be added, for

Noting, moreover, that the Commission has not imposed similar access rules on broadcasters, the court of appeals asserted that the Commission could not do so. Whether or not that assertion is correct,[24] *Midwest Video I* and *Southwestern Cable* indicated that it is beside the point. The relevant inquiry for purposes of the Commission's jurisdiction to promulgate

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> overturning the Commission's judgment that the effect in this regard will be favorable.

[24] Clearly the Commission may impose—and has imposed—on broadcasters rules analogous to the channel capacity and equipment availability rules in this case. Certainly, for example, the Commission can prescribe the transmitting power of broadcast licensees and the equipment that licensees must maintain. See 47 U.S.C. 303(c) and (e).

Whether the Commission could impose an access obligation on broadcasters analogous to the access rules at issue here is an open question. (And in view of the very different physical capabilities of broadcasters and cable systems, see note 26, *infra*, it would be difficult to compare the reasonableness of access obligations imposed on the respective systems.) In *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), the Court rejected the contention that the First Amendment required the Commission to require broadcasters to accept paid political announcements; but it also stated (412 U.S. at 131) that "[c]onceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable." As an example, the Court specifically noted the Commission's proposed access rules for cable television, which are under review in this case. *Ibid.* Furthermore, in several respects, the Commission and Congress have imposed certain access obligations on broadcasters; examples are the personal attack rule upheld in *Red Lion Broadcasting Co.* v. *FCC*, *supra*, and 47 U.S.C. (Supp. V) 312(a)(7), requiring broadcasters to provide time for candidates for federal office.

rules governing cable television is not whether the Commission has, or even could have, promulgated the identical rules for television broadcasting;[25] rather, as *Midwest Video I* stated, the relevant inquiry is whether the rules "further statutory policies" of increasing community outlets and program choices (406 U.S. at 667-668). And while cable rules (like any other) that are within the Commission's power to adopt may be set aside by a court if they are "not rational and based on consideration of the relevant factors" (*FCC* v. *National Citizens Committee for Broadcasting*, No. 76-1471 (June 12, 1978), slip op. 26), the reasonableness of the means chosen to further those statutory policies clearly depends on the particular characteristics of the communications medium to which they are applied.[26]

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[25] For example, the Commission has not imposed on television broadcasters the signal carriage rules considered in *Southwestern Cable*, for the obvious reason that broadcasting does not perform any function to which they could reasonably be applied. There is no reason to assume that Congress intended the Commission to exercise its powers over the different forms of communications media in identical ways.

[26] The principal difference between television broadcasters and cable systems that is pertinent to the rules involved here concern the physical constraints on the respective systems. The broadcaster's basic constraint, of course, is that he has only one channel on which he can broadcast no more than twenty-four hours in a day. Any access obligation imposed on a broadcaster that would meaningfully increase outlets for community expression and programming alternatives would be likely to displace a significant portion of his own programming time. A cable operator is not similarly constrained. Technology makes it reasonably feasible for each system to have twenty simultaneously transmitting channels, and possibly many more.

Finally, the court below expressed the view that the rules were unwise, not in the public interest, and not supported by record evidence showing a demand for access services.[27] But the wisdom of particular rules and whether they will serve the public interest are matters for the Commission to decide; a reviewing court is limited to determining whether they are within its statutory jurisdiction to adopt and whether they are arbitrary or capricious. See *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, slip op. 28. See also *Midwest Video I*, *supra*, 406 U.S. at 674: "It was, of course, beyond the competence of the Court of Appeals itself to assess the relative risks and benefits of cablecasting."[28] While there was, in our view, substantial evidentiary support in the rulemaking proceeding for the rules the Commission adopted,[29] the court's error was the fundamental one

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[27] Thus the court, incorrectly, described the rules here as a "major foray" designed to "get everybody on television" (App. 33), and stated that they were based on "futuristic visions" (App. 44), that they were not supported by evidence of "substantial national demand" for access (App. 48), and that they would "mandat[e] massive rebuilding * * * in total disregard of what the paying audience wants" (App. 46). See generally App. 42-53.

[28] See also, *e.g.*, *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 413-416 (1971).

[29] The court's conclusion that the record failed to indicate significant demand for access channels is simply incorrect. For example, the city and county schools in San Diego, California, commented in the rulemaking that they had committed and were using a considerable budget for educational access via cable systems to the public schools. App. 151-152. And the

of applying a substantial evidence test to the notice and comment rulemaking employed by the Commission here. In *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, among other cases, this Court has made clear that in rulemaking of this kind (slip op. 36):

> complete factual support in the record for the Commission's judgment or prediction is not possible or required: "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency," *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961) * * *.

See also *Midwest Video I*, *supra*, 406 U.S. at 673-675 & n.31.

Finally, the court of appeals' jurisdictional holding is not only inconsistent, as we have shown, with *Southwestern Cable* and *Midwest Video I*. It is also

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National Cable Television Association, although contending that access rules serve little purpose, gave the results of a survey of major market cable systems. Of 145 systems reported, 36 systems indicated regular daily or weekly use of educational, municipal and public access channels on the average of 18 hours weekly per system and 14 hours weekly per channel. NCTA Comments, filed in Docket 20508, October 3, 1975, at 26-29. This compares favorably to the average of 17 hours per week devoted to news and public affairs by commercial television stations. See F.C.C. News Release, "Television Broadcast Programming Data, 1976", Mimeo #86035, June 30, 1976.

contrary to the basic scheme and policies of the Communications Act. We see no sound reason for concluding that Congress, in its "comprehensive mandate" to the Commission in Sections 1 and 2(a) of the Act, intended to withhold from the Commission the very power, under all circumstances, to promulgate rules of this kind in furtherance of the well established statutory policies of promoting television services, outlets for community expression, and program choices for the public. To the contrary, the potential and growth of the cable television industry (see note 3, *supra*)[30] underscore Congress' "recognition [in the Communications Act] of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).[31]

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[30] As was said of cable television in *Midwest Video I*, *supra*, 406 U.S. at 651, "[t]he potential of the new industry to augment communication services now available is * * * phenomenal."

[31] Indeed, since *Midwest Video I*, Congress has acted in several ways to confirm this Court's conclusion that the Commission's regulation of cable television is congressionally authorized. In the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, 7, enacted in 1972, Congress amended Section 315 of the Communications Act, 47 U.S.C. 315, which imposes equal time and fairness obligations on broadcasting stations, to provide in Section 315(c) that:

> (c) For purposes of this section—

II

THE ACCESS, CHANNEL CAPACITY AND EQUIPMENT AVAILABILITY RULES DO NOT VIOLATE THE RIGHTS OF CABLE OPERATORS UNDER THE FIRST AMENDMENT

The court of appeals, although purporting not to rest its decision on constitutional grounds, expressed at some length its view that the rules under review violate the First Amendment rights of cable operators because they deprive the operators of control of what is communicated on their facilities. The court relied particularly on *Miami Herald Publishing Co.* v. *Tornillo*, *supra*, which held that government

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(1) the term "broadcasting station" includes a community antenna television system; and

(2) the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.

Similarly, the statutory prohibition on cigarette advertising is applicable not only to broadcasters, but to "any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." 15 U.S.C. 1335. Most recently, in Pub. L. No. 95-234, 92 Stat. 33, Congress amended 47 U.S.C. 503(b) to provide for forfeiture penalties for persons who willfully fail to comply with the terms and conditions of any "license, permit, certificate, or other instrument or authorization issued by the Commission"; the amendment expressly applies the penalty provisions to common carriers, broadcast licensees and "cable television operator[s]." These actions confirm Congress' understanding that the Commission is to regulate cable television systems, and certainly do not reflect any congressional objection to the principle of imposing access, equipment availability and channel capacity requirements on such systems.

cannot, under the First Amendment, compel a newspaper to publish the reply of a person whom the newspaper had attacked, even if the newspaper has monopoly economic power. Because the opinion below makes clear the court of appeals' view that the rules, even if within the Commission's statutory jurisdiction, are unconstitutional, this Court, if it agrees with our contention in point I that the rules are within the Commission's jurisdiction, should decide the constitutional questions.

A. The Channel Capacity Rules Do Not Violate The First Amendment Even Under the Court of Appeals' Analysis

The court of appeals' constitutional discussion did not distinguish between the channel capacity rules, the access rules or the equipment availability rules; it broadly condemned them all. But the different rules involve significantly different considerations for purpose of constitutional analysis, and we submit, as a preliminary matter, that there is no basis, even under the court of appeals' analysis, for invalidating the channel capacity rules under the First Amendment.

While the channel capacity rules were adopted in part to provide the capacity to meet access obligations, they also serve significant independent interests in the efficient and orderly development of what this Court in *Southwestern Cable* and *Midwest Video I* (and even the court below, see App. 64-65) recognized to be a "dynamic industry". Such rules are

analogous to requirements that broadcast licensees have certain minimum power capacity (see, *e.g.*, 47 U.S.C. 303(c) and (e)) or that those granted building permits provide certain minimum parking or other facilities even though present demand does not require the full use of such capacities. Such rules do not impose the burden that the court below found constitutionally offensive—*i.e.*, divesting the operator of control of what is communicated over his facilities—and there is no basis for concluding that they offend the First Amendment.[32]

B. The Access Rules Do Not Contravene The First Amendment

The court of appeals erred in concluding that the access rules violate the First Amendment, on the basis of a simple analogy to the question whether similar rules would be invalid as applied to newspapers. Determining whether the rules are consistent with the First Amendment requires a more particularized consideration of, first, the characteristics of the rules and the interests they affect, and, second, the characteristics of the industry or entities to which the rules apply. We submit that those considerations support the constitutionality of the access rules under review.

[32] The equipment availability rules, although in themselves the same kind of physical capacity requirements as the channel capacity rules, are more closely tied to the access rules, since they require the availability of equipment for access purposes. We will assume that the equipment availability rules are part of the access rules for purposes of constitutional analysis, and will not separately discuss them.

1. *The Access Rules Impose a Limited and Content-Neutral Form of Carriage Obligation In Furtherance of First Amendment Values*

The court of appeals failed to recognize the limited nature of the access rules. Contrary to its opinion, the access rules do not compel "unlimited access to cable television" (App. 66) and do not, under any circumstances "effectively silence the cable operator, denying him all use of his own facilities, for *any* exercise of his First Amendment rights" (App. 70; original emphasis). Rather, as noted in the Statement (page 11, *supra*), the rules only require cable systems with 3,500 or more subscribers to provide certain channels for access by the public, educational groups, local governments, and lessors to the extent that the system has "activated channel capacity" available for such access; and the *1976 Order* has defined "available activated channel capacity" as channels that the system is not using for its own broadcast retransmission or pay cable services. In addition, the rules permit the cable operator to combine different access uses on the same channel if demand permits even if other channels are available and activated (*i.e.*, unused by the operator). In sum, the rules do not impair the cable operator's ability to provide its principal and traditional services.[33]

[33] We can envision only two potential conflicts of any consequence between the cable operator's needs and the demands of

The rules do require that cable operators permit access users, on a first-come non-discriminatory basis,

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access users that the rules might require to be resolved in favor of access users.

As the Commission explained in the *1976 Order*, "available activated channel capacity" excludes channels used for broadcast retransmission or pay programming, but includes channels used by the operator for "origination services"—which the rules permit but no longer require the operator to provide. Consider, for example, a cable system that does not provide converters to its subscribers (who can therefore receive only 12 cable channels on their sets) and that uses 11 channels for broadcast retransmission and pay programming. If there is access demand for the twelfth channel, and if the operator has been using or desires to use that channel for its own origination (or "cablecasting") services, the rules and the *1976* Order indicate that access users be given priority for the twelfth channel and that the operator, to provide an additional origination channel to his subscribers, would have to install converters to activate a thirteenth channel, rather than relegate the access users to that course. On the other hand, the *1976 Order* indicates that the Commission has not finally decided how that kind of conflict should be resolved in particular cases, since it stated (App. 143 n.19): "It is not our intention that established cablecast services provided by system operators be automatically displaced. While we generally believe that automated services such as time and weather channels should give way to access uses, if other irreconcilable conflicts between channel uses develop, we are prepared to consider each such situation individually on its merits."

The rules also provide that, with the exception of systems in operation on June 21, 1976, with insufficient activated channel capability, "[e]ach * * * system [with 3500 or more subscribers] shall, in any case, maintain at least one full channel for shared access programming." 47 C.F.R. 76.254(c); App. 171. Consider a system without converters that commenced operations after June 21, 1976, and in time became capable of delivering 12 channels of broadcast retransmission to its subscribers. The *1976 Order* again suggests that in such a

to use channels that the operator is not using for broadcast retransmission or pay cable services. To that extent they can be viewed as a limited form of common carriage-type obligation.[34] See App. 104. But while that obligation admittedly may require a cable operator to transmit communications on its facilities that it might prefer not to, it is quite different from the obligation imposed by the right of reply statute

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case the system would have to reserve the twelfth channel exclusively for shared access rather than use it for broadcast retransmission (App. 144-145, 195). However, Section 76.254 (c) does not expressly provide that the full channel to be reserved must be one of those 12 channels that is actually available to subscribers without converters, rather than one of the 20 channels that are capable of being provided with converters.

The *1976 Order* did not specifically address the foregoing questions or other potential conflicts; rather it reserved such questions for further consideration (App. 148, 198). Until the Commission considers and resolves such particular conflicts in the context of specific cases, there is no need to speculate whether any particular resolution might present constitutional questions. But even if this Court were to conclude that certain of these provisions require a particular resolution of a hypothetical conflict that would infringe the cable operator's First Amendment rights, that conclusion would not affect the validity of the basic provisions of the rules, which present no such conflict and which, as noted, do not impair the cable operators' abilities to provide their traditional and principal services. Cf. *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932).

[34] The obligation is limited because it preserves the operator's basic freedom to engage in the business of transmitting signals of his choice and does not subject him to common carriage regulations under Title II of the Act, which would include tariff filing, rate regulation, and full dedication of facilities to common carriage.

that this Court invalidated in *Miami Herald Publishing Co.* v. *Tornillo*, *supra*.

Miami Herald involved a statute designed to foster a "responsible press" (418 U.S. at 256) by requiring newspapers to publish replies to their editorial attacks. This Court concluded that the statute would not only force newspapers to publish something they disagreed with but also would discourage newspapers from taking controversial stands on public issues with the result that "political and electoral coverage would be blunted or reduced." 418 U.S. at 257. In contrast, the access obligations at issue here are entirely unrelated to the content of what the cable operator otherwise transmits. The regulations in this case, as in *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, are "not content-related" (slip op. 24).

Finally, it is significant that the access rules do not present a question of subordinating First Amendment interests to other, unrelated, governmental interests. Rather, to the extent they can be regarded as affecting the First Amendment interests of cable operators, they present a question of competing First Amendment interests. That is so because the rules are designed to enhance what this Court has recognized many times to be important First Amendment interests, by providing significant additional outlets for expression of diverse views by individuals and groups within communities served by cable television.

In *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), in upholding the application of the antitrust laws to the news media, this Court stated:

> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. * * * Freedom to publish means freedom for all and not for some.

Similarly, in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), the Court reaffirmed our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969), the Court upheld the Commission's personal attack rule and fairness doctrine as applied to broadcasters, stating: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." And in the context of those rules the Court stated, "[i]t is the right of the viewers and listeners, not the right of broadcasters, which is paramount" (*ibid.*). See also *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, upholding rules prospectively banning co-located newspaper-broadcaster combinations: "[T]he purpose and effect [of the rules] is to promote free speech, not to restrict it" (slip op. 24).

Finally, in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), although rejecting claims that the First Amendment compelled the Commission to permit access to broadcast facilities for paid advertisements concerning controversial public issues, the Court acknowledged the First Amendment values in diversity of expression and increased programming (*id.* at 101-102, 110-114, 122), and stated (*id.* at 131):

> Conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable. Indeed, the Commission noted in these proceedings that the advent of cable television will afford increased opportunities for the discussion of public issues. In its proposed rules on cable television the Commission has provided that cable systems in major television markets
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> > "shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programming for such a channel." 37 Fed. Reg. 3289, § 76.251(a)(4).

We recognize that the Court in *Columbia Broadcasting System* did not rule on the validity of the access rules that it mentioned. We also recognize that the Court in *Miami Herald* was presented with a claim that the Florida right of reply statute was

designed to enhance First Amendment interests in diversity of expression and held that those interests could not justify the restriction there at issue on the First Amendment rights of affected newspapers. But the Court in both cases acknowledged the competing First Amendment interests involved, and both cases support, rather than undermine, our contention that the important First Amendment interests that the access rules are designed to promote constitute a significant factor in determining their constitutionality. We submit that a proper consideration of those interests, of the relatively limited burdens imposed on cable operators, and of the particular and distinguishing features of cable television (discussed in the following section) shows that the access rules are "both practicable and desirable" (*Columbia Broadcasting System, supra*, 412 U.S. at 131) and consistent with the First Amendment.

2. *The Access Rules are Consistent With the First Amendment In View of the Particular Characteristics of Cable Television*

We have argued in the preceding section that the court of appeals erred in analogizing the access rules to the statute invalidated in *Miami Herald*. We also contend, in this section, that the court erred in equating cable television with newspapers, and also erred in concluding that the rules are invalid because cable television is not subject to the physical limitations of the broadcast spectrum. While the cable television industry has similarities to a number of

other industries—broadcasters, common carriers, public utilities, and newspapers—it also has features that distinguish it from each of those others. And the constitutionality of rules applied to that industry depends, *inter alia*, on an analysis of those similarities and differences. As this Court stated in *FCC* v. *Pacifica Foundation*, No. 77-528 (July 3, 1978), slip op. 19: "We have long recognized that each medium of expression presents special First Amendment problems."

We may assume *arguendo* that even the limited form of common carriage-type obligations imposed by the access rules could not be imposed on newspapers.[35] But it has never been doubted that the government can impose common carriage obligations on telephone and telegraph carriers and can require them to carry messages that they might prefer not to. And this Court in *Red Lion Broadcasting*, *supra*, upheld the constitutionality of a limited access obligation imposed on broadcasters (*i.e.*, access to reply to personal attacks) that a state could not, under *Miami Herald*, impose on newspapers. For purposes of constitutional analysis, there are important similarities between cable television and broadcasters and communications

[35] On the other hand, it could reasonably be argued that a state could, for example, require a newspaper to offer its classified advertising services to the public on a nondiscriminatory basis. Cf. *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973). Moreover, this Court has expressly held that a newspaper "may not accept or deny advertisements" in furtherance of an attempt to monopolize or restrain trade in violation of the antitrust laws. *Lorain Journal* v. *United States*, 342 U.S. 143, 156 (1951).

common carriers, as well as important differences between cable television and newspapers or other print media.

First, as we have noted, the four dissenting Justices in *Midwest Video I* stressed that "CATV is simply a carrier having no more control over the message content than does a telephone company" (406 U.S. at 680). While some cablecasters today originate or select some of their programming, the retransmission of broadcast signals or the transmission of programs designed for broadcast elsewhere is still the pervasive characteristic of the industry. Indeed, the access rules apply only to cable systems that retransmit broadcast signals (see 47 C.F.R. 76.5(a)).

Second, these broadcast-related activities support an expensive system of distribution having the characteristics of a natural monopoly. In significant respects a cable system is similar to a public utility; its operations require the placement of wires over or under the public streets involving substantial capital investment similar to that of other natural monopolies.[36] In contrast to the possibilities that exist in the

[36] Accordingly, most localities require a cable system to obtain a local government franchise before it can commence operations—an obligation that it is doubtful that a state could impose on a newspaper or magazine. See *Pacifica Foundation*, *supra*, slip op. 19-20. See generally Barnett, *State, Federal, and Local Regulation of Cable Television*, 47 Notre Dame L. Rev. 685 (1972). Indeed, the proposition endorsed by the court below that cable systems are not distinguishable from newspapers for First Amendment purposes would raise serious doubts as to the constitutionality of such local franchising regulations.

print media for such devices as direct mailings or dissemination of pamphlets or handbills, there is no practical way to engage in limited or ad hoc cablecasting without access to the system.[37]

Third, cable television has close and obvious similarities to television broadcasting, on which its business for the most part depends. It is true that cable television is not subject to the physical spectrum limitations on which this Court relied in *Red Lion Broadcasting Co.* v. *FCC*, *supra*, in upholding the application of the Commission's fairness doctrine and personal attack rules to broadcast licensees. See also *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, slip op. 22. However, this Court recently ob-

[37] The proposition that the differences between cable television and newspapers are of constitutional significance is implicit in *Southwestern Cable* and *Midwest Video I*, both of which upheld the Commission's authority to prescribe rules for cable television that government could not, under *Miami Herald*, prescribe for newspapers. See also discussion, pages 48-49, *infra*. Indeed, the Court's opinion and a concurring opinion in *Miami Herald* strongly suggest the Court's recognition of the special and distinguishing features of the print media. The Court's opinion focuses almost exclusively on newspapers and the print media, and Mr. Justice White, concurring, stated that "the First Amendment erects a virtually insurmountable barrier between government and the *print* media * * *" (418 U.S. at 259; emphasis added). This Court has also recognized in several other cases that the electronic media present "special" problems which may warrant a different regulatory approach. See, *e.g.*, *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 773 (1976); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 384 (1977); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 791 n.30 (1978).

served in *FCC* v. *Pacifica Foundation*, *supra*, slip op. 20, that "[t]he reasons for * * * [First Amendment] distinctions [between the broadcast and print media] are complex," rather than related solely to the physical limitations of the broadcast spectrum. From the standpoint of viewers and listeners, the similarities between cablecasting and broadcasting as media of expression all but eclipse the differences. And, for First Amendment purposes, "[i]t is the right of the viewers and listeners, not the right of the broadcasters [or cablecasters], which is paramount." *Red Lion*, *supra*, 395 U.S. at 390.

Furthermore, the physical constraints facing would-be cablecasters are in significant respects similar to the physical limitations of the broadcast spectrum. In *Red Lion*, the Court upheld the Commission's personal attack rules and fairness doctrine on the ground (395 U.S. at 388):

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.

The same considerations support the access rules at issue here. While a given cable system is not subject to the limitations of the radio spectrum, there are significant physical limitations, noted above (page 45, *supra*), that prevent most individuals who may wish to cablecast from constructing and operating their own cable television systems. Those constraints are not

merely the kind of economic constraints considered in *Miami Herald*, and indeed they are significantly greater than the constraints facing would-be broadcasters. The difficulties confronting would-be cablecasters are comparable to the difficulties that would face would-be telephone users who, in the absence of access to the facilities of a telephone company, would each have to construct his own telephone system to communicate by telephone. As in *Red Lion*, where one or two companies have acquired the privilege of constructing a large cable network in a community, "it is idle to posit an unabridgeable First Amendment right [to operate such a system] comparable to the right of every individual to speak, write, or publish" (395 U.S. at 388).

Finally, our submission that the access rules are consistent with the First Amendment derives significant support from *Southwestern Cable* and *Midwest Video I*. *Southwestern Cable* involved the Commission's signal carriage rules, which, *inter alia*, also imposed upon cable operators a limited form of carriage obligation—namely, the obligation to retransmit, upon request, the broadcast signals of broadcast licensees serving the same community as the cable system. Although this Court did not specifically address the First Amendment issues, it expressly noted in *Midwest Video I* that the courts of appeals had correctly upheld the signal carriage rules, citing *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968) (406 U.S. at 659 n.17);

and *Black Hills Video Corp.* expressly rejected First Amendment challenges to those rules. 399 F.2d at 69.[38] For First Amendment purposes, we see no material distinction between the limited carriage obligation involved in *Southwestern Cable* and *Black Hills* and the access rules involved here.

III

THE RULES UNDER REVIEW DO NOT CONSTITUTE A TAKING OF PROPERTY WITHOUT COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT

The court of appeals also erred in suggesting that the channel capacity, access, and equipment availability rules constituted a taking of property without just compensation in violation of the Fifth Amendment (App. 77-79).[39]

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[38] In *Black Hills*, the mandatory carriage rule, along with the Commission's distant signal and non-duplication rules for cable television, were specifically upheld against a First Amendment attack. The distant signal and/or non-duplication rules were also found constitutionally valid in *Conley Electronics Corp.* v. *FCC*, 394 F.2d 620, 624 (10th Cir.), cert. denied, 393 U.S. 858 (1968); *Titusville Cable TV, Inc.* v. *United States*, 404 F.2d 1187, 1189-1190 (3d Cir. 1968); and *Great Falls Community TV Cable Co.* v. *FCC*, 416 F. 2d 238, 240-242 (9th Cir. 1969).

[39] In addition, the court expressed the view that the rules "violate the due process provisions of the Constitution" (App. 77). The reasons for that conclusion are not clear, since there was no claim that any party's procedural rights were violated during the Commission's proceedings. The court appears to have relied on notions of substantive due process and its own manifest dislike of the rules, saying (App. 78 n.78): "Those relying on regulatory power and exuberance,

While it may be difficult in some cases to draw the line between permissible regulation and an unconstitutional taking, and the question is one of degree (see *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415-416 (1922)),[40] the rules at issue here do not present even a colorable taking claim. In *Penn Central Transportation Co.* v. *New York City*, No. 77-444 (June 26, 1978), this Court listed two factors that have particular significance in determining whether there has been a taking: first, "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investiment backed expectations"; and, second,

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to deliver over the facilities of another at no cost, may rue the day. The regulatory mind is normally unbiased; the regulatory rain falls on all." But the court's personal views on the merits of economic regulation is not a ground for finding a due process violation. As this Court stated in *Ferguson* v. *Skrupa*, 372 U.S. 726, 731-732 (1963) (citations omitted):

> We refuse to sit as a "superlegislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

[40] There Mr. Justice Holmes stated for the Court: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * [T]his is a question of degree—and therefore cannot be disposed of by general propositions." See also *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962) ("There is no set formula to determine where regulation ends and taking begins").

"the character of the governmental action * * * [*e.g.*, whether it] can be characterized as a physical invasion by Government" (slip op. 18). Here, the relatively limited obligations imposed by these rules do not significantly impair the operator's abilities to provide his own services or recover his investment. Moreover, this is not a situation where there has been a physical invasion by government. Compare, *e.g.*, *United States* v. *Causby*, 328 U.S. 256 (1946). Rather, it is a case where the "interference," such as it is, "arises from [a] public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, *supra*, slip op. 18. Accordingly, the rules involved here fall far short of a taking.[41]

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[41] Indeed, the due process and taking arguments accepted by the court of appeals are substantially the same arguments made by the cable operators in opposing the significantly more burdensome mandatory origination rule upheld by this Court in *Midwest Video I*. See Brief of Midwest Video Corp. in No. 71-506 at 32-38; *Midwest Video I*, *supra*, 406 U.S. at 658 n.15, 662-664. As previously noted (pages 7-8, *supra*), the Commission repealed the origination rule in favor of access obligations partly because it found the latter to be less burdensome to cable operators.

CONCLUSION

The judgment of the court of appeals should be reversed and the order of the Commission affirmed.

Respectfully submitted.

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Nos. 77-1575, 77-1648 and 77-1662

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

MIDWEST VIDEO CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT MIDWEST VIDEO CORPORATION

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COUNTERSTATEMENT

A. Events Leading to This Proceeding

The mandatory origination rule which was before this Court in 1972 in *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972) (hereinafter "*Midwest I*") had been stayed by the Federal Communications Commission (hereinafter "FCC")

while that case was pending before this Court.[1] After *Midwest I*, which upheld the mandatory origination rule, the stay continued in effect, and in early 1974, the FCC launched a proceeding reevaluating that rule.[2] In December 1974, the FCC repealed the mandatory origination rule[3] for the following reasons:

> Quality, effective, local programming demands creativity and interest. These factors cannot be mandated by law or contract. The net effect of attempting to require origination has been expenditure of large amounts of money for programming that was, in many instances, neither wanted by subscribers nor beneficial to the system's total operation. In those cases in which the operator showed an interest or the cable community showed a desire for local programming, an outlet for local expression began to develop regardless of specific legal requirements. During the suspension of the mandatory rule, cable operators have used business judgment and discretion in their origination decisions. For example, some operators have felt compelled to originate programming to attract and retain subscribers. These decisions have been made in light of local circumstances. This, we think, is as it should be. *Report and Order in Docket No. 19988*, 49 FCC 2d 1090, 1105-06 (1974).

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[1] *Suspension of Community Antenna Television Mandatory Origination Rule Pending Further Judicial Review*, 36 Fed. Reg. 10876 (1971).

[2] *Notice of Proposed Rule Making In Docket No. 19988*, 46 FCC 2d 139 (1974).

[3] The FCC adopted an alternative rule (the equipment availability rule) in that proceeding, requiring cable systems with 3,500 or more subscribers, regardless of the size of the markets in which they operated, to purchase equipment for the production of local programming, to make this equipment available to the public, and to make cable channel time available for the presentation of programs thus produced. Midwest Video Corporation petitioned the United States Court of Appeals for the Eighth Circuit for review of the FCC's order adopting that rule, but the adoption of superseding rules in this proceeding largely mooted the issues in that case, and it was voluntarily dismissed. *Midwest Video Corp.* v. *FCC*, No. 75-1671 (8th Cir., dismissed Apr. 12, 1976).

In the meantime, while *Midwest I* was pending before this Court, the FCC in early 1972 issued the *Cable Television Report and Order*, 36 FCC 2d 143, *recon. generally denied*, 36 FCC 2d 326 (1972), in which it adopted extensive rules governing cable television carriage of broadcast signals, providing for public access to and use of nonbroadcast channels, establishing cable television technical standards, and allocating regulatory authority between federal and state or local governments. Under these rules, cable systems operating in the 100 largest television markets (the "top 100 markets") were permitted to carry greater numbers of distant television signals than systems in smaller markets.[4] The FCC recognized that carriage of additional distant signals would increase the attractiveness of the service package offered by the cable system, and as a *quid pro quo* for the benefits of increased signal carriage the FCC imposed channel capacity and access obligations on top 100 market cable systems. Under the rules adopted in 1972, top 100 market cable systems were required to have two-way transmission capability, to provide equipment for production of public access programming, and to provide at least 20 channels for cable television operations. Three of these channels would be reserved for use as access channels, to be made available at no charge[5] to public, educational, and governmental users. Cable systems were also required to adopt operating rules providing for access channel use on a first come, nondiscriminatory basis, with no control by the cable operator over program

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[4] In the top 100 markets, cable systems were authorized to carry a minimum of two distant non-network signals. In the smaller markets, cable systems were authorized to carry only one distant non-network signal, and then only if there was not a local non-network station. *Compare* Section 76.59 with Section 76.61 and 76.63 of the Rules as published in *Cable Television Report and Order, supra*, 36 FCC 2d at 230-233.

[5] While no charge was to be made for use of these channels, reasonable charges could be made for the cost of production, except that no production charge could be made for live presentations of less than five minutes' duration on the public access channel. The no-charge provision was to be permanent in the case of the public access channel and for a five-year minimum period following construction of the cable system for the educational and governmental channels.

content. All cable system channels not used for the carriage of broadcast signals or for public, educational or governmental access were to be available for leased access use, again on a first come, nondiscriminatory basis. No such requirements were imposed on systems located outside of the top 100 markets.[6] Midwest Video Corporation (hereinafter "Midwest") operates no cable systems in the top 100 markets, so the access and channel capacity obligations adopted in the 1972 *Cable Television Report and Order* were not applicable to it.

In 1975, shortly after repealing the mandatory orgination rule, the FCC initiated the proceeding here under review to consider possible revision of the channel capacity, access and and other requirements of its cable television rules.[7] The proceeding culminated in the adoption in May 1976 of the *Report and Order in Docket No. 20508* (hereinafter "the *1976 Order*")[8] and the rules which are the subject of the present proceedings.

B. The 1976 Order

In the *1976 Order* adopting the rules here under review, the FCC modified the access rules adopted in 1972 and extended

[6] Top 100 market cable systems which had been in operation prior to March 31, 1972, were given until March 31, 1977 to come into compliance with the access and channel capacity rules.

[7] At approximately the same time, the FCC initiated a proceeding to suspend the March 31, 1977 compliance date specified in the *Cable Television Report and Order* for top 100 market cable systems to come into compliance with the channel capacity and certain other requirements of the rules adopted therein. The compliance date was suspended in the FCC's *Report and Order in Docket No. 20363*, 54 FCC 2d 207 (1975), *petition for review pending sub nom. National Black Media Coalition* v. FCC, No. 75-1792 (D.C. Cir.).

[8] 59 FCC 2d 294 (1976). The *1976 Order* is also set forth in Appendix B of the Petitioner's Appendix at 93-181. (The Petitioner's Appendix will subsequently be referred to as "App."). Petitions for Reconsideration of that action were denied in December 1976. *Memorandum Opinion and Order in Docket No. 20508*, 62 FCC 2d 399 (1976) (hereinafter "*Reconsideration*"), Appendix C of App. at 182-206.

their applicability to all cable systems having 3,500 or more subscribers. Although the FCC found that "in the vast majority of communities presently providing multiple channels for access use, these channels are at best sporadically programmed" (App. 138) and even though in its *Reconsideration* the FCC recognized that "even larger systems typically have difficulty finding access channel users" (App. 191), the FCC nevertheless adopted rules which require all cable systems with 3,500 or more subscribers, wherever located, to provide channel time, production equipment and studio facilities at little or no cost, lease channels for commercial use, and rebuild their facilities to have channel capacity sufficient to provide channels for these purposes. Notwithstanding the FCC's willingness to leave program origination decisions formerly required under the mandatory origination rule to marketplace forces and local circumstances, the FCC refused to follow a similar course of action with respect to access requirements:

> Were we at this stage of cable's evolution to leave the provision of channel capacity and access services entirely to the marketplace, such action could have the practical effect of providing a barrier to the growth of new services which we expect of cable. *1976 Order* (App. 156).

The rules adopted in the *1976 Order* contain the following requirements applicable to all cable systems having 3,500 or more subscribers:

> (a) When constructing new cable systems, a minimum channel capacity of twenty channels[9] and the technical capability for two-way, non-voice communication must be installed.[10]

[9] As set forth in note 11, p. 6, *infra*, there is a difference between channel capacity and activated channel capacity, and typically even cable systems with a twenty channel capacity cannot deliver more than twelve channels to subscribers unless they also install converters.

[10] Top 100 market systems in operation prior to March 31, 1972 and other systems in operation by March 31, 1977 have until June 21, 1986 to comply with this requirement. Section 76.252 (App. 168-69).

(b) To the extent of their activated channel capability,[11] cable systems must make four separate access channels available, with public, educational, local government and leased access users each assigned a separate channel.[12] If there is not sufficient demand for each channel full-time for its designated use, the four types of access can be combined on one or more channels,[13] but if demand on any access channel exceeds specified usage criteria, the cable system must, to the extent of its activated channel capability, within six months make yet another access channel available.[14] A limited grandfathering provision permits cable systems which were in operation on June 21, 1976, the effective date of the rules, to continue operating without a dedicated access channel if at that time the

[11] A cable television system's activated channel capability is the number of usable channels which it actually provides to the subscriber's home, or which it could provide by making comparatively inexpensive ($800 to $1,200) modifications to its facilities. *1976 Order* (App. 141-142). Typically, cable systems are limited to an activated capacity of twelve channels unless converters are installed at the television set of each subscriber. (In some cases electrical interference rendering some channels unusable reduces activated channel capacity even further.) Through the use of converters, programming transmitted on cable channels which television sets are not equipped to receive can be converted to channels which can be received by home sets. In the *Notice of Proposed Rule Making* instituting this proceeding, 53 FCC 2d 782, 785 (1975), the FCC estimated the cost of converters at $25 to $40 per subscriber, exclusive of labor; the FCC recognized in the *1976 Order* that the cost of installing converters in a 3,500 subscriber system, at $40 per converter, would be at least $140,000 (App. 136-37). In view of these costs, the FCC provided that cable operators need not install converters to meet their obligations under the new rules, except where systems commencing operation after June 21, 1976 or any systems adding a new non-local signal do not have at least one specially designated channel available on a full-time basis for access use. Sections 76.254(c), (d) and (e) (App. 171); *1976 Order* (App. 139-41).

[12] Section 76.254(a) (App. 169-70).

[13] Section 76.254(b) (App. 202).

[14] Section 76.254(d) (App. 171).

system had insufficient activated channel capability to dedicate one full channel for access programming, but new systems commencing operation after that date and existing systems seeking to add a broadcast signal after that date must have at least one fully dedicated access channel even if they must install converters in order to do so.[15]

(c) Cable systems must have available a studio and equipment for the local production and presentation of programs and permit use of the studio and equipment for the presentation of public access programs.[16]

(d) The rules prohibit the cable operator from assessing any charge for the use of one public access channel[17] and from assessing any charge for the use of educational and governmental access until five years after the cable system first offers channel time for those purposes.[18] The rates which may be charged for leased access channels must be "appropriate".[19]

(e) With respect to the equipment, personnel and production costs for public access programming, the charges "shall be reasonable and consistent with the goal of affording users a low-cost means of television access. No charge shall be made for live public access programs not exceeding five minutes in length."[20] Even when charges for equipment, personnel, or production may be imposed, the cable system may not charge for the use of its playback equipment or its personnel required to operate such equipment in order to present tapes or film provided by public access channel users when no use of the cable system's production equipment is involved and the tape or film can be played without further technical alteration to the cable

[15] Section 76.254(c) (App. 171) and *1976 Order* (App. 140-41).

[16] Section 76.256(a) (App. 172).

[17] Section 76.256(c)(2) (App. 173).

[18] Section 76.256(c)(1) (App. 173).

[19] Section 76.256(d)(3) (App. 174-75).

[20] Section 76.256(c)(3) (App. 173).

system's equipment.[21] The rules also require that cable systems not limit the use of access channels to normal business hours.[22] The combined effect of these requirements is that cable operators may not impose charges designed to amortize the cost of tape or film playback equipment needed to present public access programming and must have personnel available or on call, at their own expense, for an unspecified but substantial number of hours beyond the normal work day, to operate the playback equipment.

(f) Each cable system must promulgate rules providing for first-come, nondiscriminatory access on public and leased channels.[23] Cable systems may not exercise any control over programming content on any of the access channels except that operators must adopt rules prohibiting the transmission of lottery information and, for all but leased access channels, commercial matter.[24]

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[20] Section 76.256(c)(3) (App. 173).

[21] *Reconsideration* (App. 199-200).

[22] *Reconsideration* (App. 198-199).

[23] Section 76.256(d)(1) and (3) (App. 173-175).

[24] Sections 76.256(b) and (d) (App. 172-75). The rules also require cable systems to include in their operating rules a prohibition against the transmission of obscene and indecent matter on their access channels. This aspect of the access rules has been stayed by the U.S. Court of Appeals for the District of Columbia Circuit in an Order filed on August 26, 1977 in *American Civil Liberties Union v. FCC*, No. 76-1695 (D.C. Cir.). The Eighth Circuit also concluded that this requirement imposed impermissible censorship obligations on cable systems (App. 75-77). The FCC did not seek review of that conclusion and has instituted a review of the provision of the rules dealing with obscene and indecent matter on access channels. While this aspect of the access rules is therefore no longer at issue in this proceeding (G. Br. 15, n. 15), the result is that the combined effect of the stay of the rule requiring cable systems to censor obscene and indecent programming and the rule forbidding cable systems to exercise program content control leaves cable systems without any basis for declining to present obscene or indecent programming on access channels, thus risking loss of subscribers and alienation of franchising authorities. Moreover, the transmission of such programming could subject the cable operator to criminal liability under state and local ordinances—a consideration which led the Eighth Circuit to conclude that the access rules violate the due process clause of the Fifth Amendment (App. at 79-82).

(g) Despite the burdensome nature of the access requirements, which in 1972 the FCC recognized as the *quid pro quo* for permitting top 100 market cable systems to carry two distant non-network signals at the time it first imposed access obligations on cable systems,[25] the signal carriage rules were not amended to permit cable operators such as Midwest, who first became subject to the access rules as a result of the *1976 Order*, to carry any additional non-network signals.

The access rules first adopted in the *Cable Television Report and Order, supra*, and modified and extended to cable operators outside the top 100 markets by the *1976 Order*, impose obligations vastly different in both scope and kind from those before this Court in *Midwest I*. The mandatory origination rule did not require dedication of any channels solely for origination and left to the cable operator's discretion when and where on his channels he would provide program originations and the content of those originations. It imposed no channel capacity or building requirements and no limitations on how the cable operator might recoup the costs he incurred for the use of his channels (e.g., through advertising or charges to programmers). The access rules, on the other hand, remove from the cable operator control over who may use the cable system's channels and how, require the cable operator to forego the opportunity to earn any revenue from the service provided on most access channels, require the cable operator to have equipment or personnel available or on call, in many instances without charge, at the whim of access users, and require most cable systems to provide a less attractive total service package to subscribers than they would otherwise be able to provide because of the unavailability of one or more channels which are reserved or used for access.

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[25] *Cable Television and Order, supra*, 36 FCC 2d at 190.

C. Cable Systems Select From a Multitude of Program Sources

The Government, in its Brief,[26] has described the operation of the access rules as follows:

> [A] cable system must allow four groups (the public, educational authorities, local governments and paying lessors) to use available channels of the system that the cable operator is not using for broadcast retransmission or pay programming services. The rules do not require the system to displace those services in favor of providing access. (G. Br. 11) (citation and footnote omitted).

This description implies that the number of broadcast and pay programming services available to cable systems are not usually sufficient to require cable systems to make a choice between available broadcast signals and pay services, that there are no other types of programming services from which cable systems can select to fill their channels, and that the access requirements therefore do not seriously impair the choice of programming that cable systems can offer. But this is simply not the case. The FCC's signal carriage rules adopted in 1972, shortly before this Court's decision in *Midwest I*, accorded cable systems some choice in selecting the number of broadcast signals they could carry, and amendments to those rules since 1972 have substantially increased the number of available signals and programming choices. Of even more importance, the development of satellite communications has produced a revolution in the technological means utilized for delivering both broadcast and non-broadcast programming to cable systems, and numerous

[26] The Brief for the United States and the Federal Communications Commission will be referred to herein as the Government Brief and cited as "G. Br." The Brief for the American Civil Liberties Union (hereinafter "ACLU") will be cited as "ACLU Br." The Brief for the National Black Media Coalition et al. (hereinafter "NBMC") will be cited as "NBMC Br."The Brief Amicus Curiae for the Motion Picture Association of America (hereinafter "MPAA") will be cited as "MPAA Br."

programmers have commenced utilizing this new distribution technology. These developments have resulted in the availability of an abundance of programming to cable systems.

1. FCC Signal Carriage Rules

In *Cable Television Television Report and Order, supra*, the FCC in 1972 overhauled its rules regulating the carriage of television signals.[27] These rules and subsequent developments are briefly summarized below.

> (a) Under the rules adopted in 1972, cable systems in and near the top 100 markets were authorized to carry at least two distant non-network signals, but those signals had to come from one of the two closest top 100 markets. In smaller markets, one distant non-network signal could be carried but only if there was no local non-network station. Cable systems located outside of all television markets were not subject to any restriction on the number of distant signals they might carry. In addition, all cable systems could carry the signal of any noncommercial educational station operated by an agency of the state in which the system is located, any other noncommercial educational signals in the absence of objection by local noncommercial educational interests, and any television station broadcasting predominantly in a non-English language.[28] The 1972 rules also contain provisions permitting top 100 market cable systems to substitute programs from distant stations when protecting the contractual exclusivity rights of local stations in non-network programs or when the distant station is carrying a program primarily of local interest to the community in which the station operates.[29]

[27] The new rules carried forward the requirements in the rules before this Court in *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968), for carriage of local television stations.

[28] See Sections 76.57-76.63 as originally promulgated, *Cable Television Report and Order, supra*, 36 FCC 2d at 230-233.

[29] See Section 76.61(b)(2)(ii). This rule as originally adopted is set forth in *Cable Television Report and Order, supra*, 36 FCC 2d at 232, and the rule has not been changed since its adoption but has been recodified as Section 76.61(b)(2), 47 CFR 76.61(b)(2).

(b) In 1974, the FCC amended its rules to permit most cable systems to carry unlimited amounts of late-night programming. As amended on reconsideration, this rule permits carriage of late-night programming from any television station beginning at 1:00 A.M. (12:00 midnight in the Central and Mountain Time Zones) until sign-on of the first local station unless there is a local station that broadcasts continuously from midnight to 6:00 A.M.[30]

(c) In 1976, the FCC eliminated the restrictions described in (a) above which limited the choice of distant non-network signals cable systems could carry to those from the closest markets.[31] This change was significant because, with the advent of satellite distribution of television signals, it greatly increased the ability of cable systems to choose non-network signals, consistent with the signal carriage limitations, whose programming would provide the most diversity to their subscribers.[32]

(d) Also in 1976, the FCC amended and expanded its rule authorizing carriage of non-English language stations to permit carriage of any specialty station (*i.e.*, a station that generally carries foreign-language, religious and/or automated programming for one-third of the hours in an average broadcast week and one-third of weekly prime time hours) and the signal of any station when it is broadcasting a foreign language, religious or automated program.[33] At the time the FCC ruled on the petitions for reconsideration in that proceeding, it released a list[34] of 26 stations throughout the country which met its definition of

[30] *Report and Order in Docket No. 20028*, 48 FCC 2d 699 (1974), *as modified upon reconsideration*, 54 FCC 2d 1182 (1975).

[31] *Report and Order in Docket No. 20487*, 57 FCC2d 625 (1976), *recon. denied*, 59 FCC2d 934 (1976).

[32] *Infra*, pp. 17-18.

[33] *First Report and Order in Docket No. 20553*, 58 FCC2d 442 (1976), *recon. denied*, 60 FCC2d 661 (1976).

[34] Appendix B to its *Memorandum Opinion and Order* denying reconsideration, 60 FCC2d at 670.

specialty station, and since that time the FCC has added an additional eleven stations to the list.[35] The FCC has also authorized the carriage of English-language programs directed to specific ethnic groups as specialty programming upon the individual request of cable operators.[36]

Thus, the FCC's rules,[37] despite the still extensive restrictions on the signals cable systems can provide to their subscribers, permit the carriage of a large number of broadcast signals and accord cable operators a considerable measure of discretion in signal and program selection, especially in the selection of the most desirable non-network signals whose carriage is consistent with the limits on the number of such signals which can be carried, in the availability of late-night programming, in the unlimited choice of educational and specialty stations and specialty programming, and in program substitutions when distant non-network stations are carrying programs primarily of local interest or programs to which local stations hold exclusive rights.

2. Domestic Satellite Service to the Cable Industry

Although the first domestic satellite service in the United States commenced in December 1973, domestic satellites were not used to provide service to cable systems until August 1, 1975, when the FCC granted the first authorization to a cable

[35] The signal of at least one specialty station is distributed by satellite and available to cable systems throughout the country. See the discussion of KTBN, *infra*, p. 16.

[36] *See, e.g., Gerity Broadcasting Company*, 63 FCC 2d 230 (1977).

[37] Other less significant changes were also made in the FCC's signal carriage rules, such as permitting cable systems to carry any network program not broadcast by stations normally carried, *Reconsideration of Cable Television Report and Order, supra*, 36 FCC2d at 333-334; permitting cable systems to carry the second feed of early evening network news programs in some circumstances, *Report and Order in Docket No. 19859*, 57 FCC2d 68 (1976); and permitting cable systems to carry the signals of any UHF station within whose Grade B contour the system operates, *Report and Order in Docket No. 20496*, 65 FCC2d 218 (1977), *recon. denied*, 43 Pike & Fischer Radio Regulation 2d 1553 (1978).

system for its own receive-only earth station.[38] Between that date and December 15, 1976, when the FCC, in its Declaratory Ruling and Order in *American Broadcasting Companies, Inc.*, 62 FCC 2d 901 (1977), authorized cable systems to utilize less expensive small diameter antennas on their earth stations, over 100 earth stations were installed by cable operators.[39] By April 15, 1977, 136 earth stations had been licensed or authorized to cable systems,[40] and by April-May 1978, this number had increased to 422.[41] In its Brief, MPAA estimates the current number of earth station authorizations at 600, with this number increasing at a rate of about 25 per week (MPAA Br. 5, n. 4), and the FCC, in a news release issued December 4, 1978,[42] stated that over 1,300 earth stations serving cable systems, broadcast stations and others who distribute video programming are currently licensed.

At the time the first cable television earth station was authorized, the only programming regularly available to cable systems was the pay programming[43] of Home Box Office, Inc.[44] In

[38] *Florida Cablevision*, 54 FCC2d 881 (1975).

[39] *American Broadcasting Companies, Inc., supra*, 62 FCC2d at 911.

[40] Television Digest's *1977 CATV and Station Coverage Atlas*, pp. 196a-200a.

[41] Television Digest's *1978 Cable Station Coverage Atlas*, pp. 205a-217a.

[42] Action in Docket Case, Report No. 14610, Dec. 4, 1978.

[43] "Pay programming," as that term is used in this Brief, is programming for which a customer pays a specific charge either for individual programs or for a separate channel of programming not available to nonsubscribers. Pay programming usually consists primarily of recent motion pictures, though some pay program distributors also provide sports events and other programming originated by or purchased by the distributor. Pay programming is offered to members of the public not only by cable systems but also by broadcast stations which have received subscription television authorizations from the FCC and by the lessees of common carrier facilities licensed by the FCC in the Multipoint Distribution Service, as well as by tape or film in some apartment houses and hotels. When cable systems offer pay programming, they make a charge for the service in addition to the normal subscription fee charged for delivery of television signals and other originated programming.

[44] This is the programming Florida Cablevision was authorized to receive. *Florida Cablevision, supra* note 38, 54 FCC2d at 882.

the short span of three and one-half years since then, as the number of earth stations has increased, so too has the amount of satellite distributed programming available to cable systems. Since the FCC restricts cable systems only in the carriage of broadcast signals, most of the satellite distributed programming can be added by cable systems without obtaining any authorization from the FCC other than an earth station license. The types of programming currently available or expected to be available by satellite in the near future are as follows:

(a) Three companies currently offer pay programming by satellite.[45] Home Box Office, Inc. and Showtime Entertainment Inc. offer primarily movies and occasional special programming. Fanfare Television provides both movies and sports events, with the sports consisting primarily of home games of professional sports teams in Houston, Texas.[46] Two of these companies, Home Box Office, Inc. and Showtime Entertainment Inc. have plans to offer a second pay program package providing a smaller number of programs each month at a lower price.[47]

(b) Three companies, Christian Broadcasting Network, PTL (People That Love), and Trinity Broadcasting Network, each offer a channel of religious programming by satellite. The Christian Broadcasting Network and PTL

[45] Several other parties offer pay programming to cable systems through tapes, cassettes, or terrestrial microwave facilities. One of these parties, Warner Cable Corp., has announced that it will convert its cassette pay cable operation to satellite and will offer that service to other companies. "Warner Cable Now Offering *Star Channel* Feed to Others," *Pay TV Newsletter*, Dec. 4, 1978, p. 5. The increase in the number of parties offering pay programming by satellite may be in part attributable to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977), which invalidated restrictive FCC rules limiting the pay programming that could be provided by cable systems.

[46] *Broadcasting*, May 1, 1978, p. 63, and May 22, 1978, p. 75.

[47] *Broadcasting*, Aug. 7, 1978, p. 58 (Showtime); and *Pay TV Newsletter*, Sep. 6, 1978, p. 1 (HBO).

programming consist of originated programming rather than transmission of a broadcast signal, while the Trinity Broadcasting Network programming consists of the satellite distributed signal of Station KTBN, a specialty station licensed to Fontana, California (a community in the Los Angeles television market).[48]

(c) U.A. Columbia Cablevision, Inc. distributes a program package consisting primarily of sports events from Madison Square Garden and offers cable systems the option of providing this programming to their subscribers as pay programming or as part of the basic service package.[49] This year U.A. Columbia Cablevision, Inc. also offered, as an additional option to its service, movies for children.[50]

(d) In December 1978, Warner Cable Corp. announced plans to commence distribution in February 1979 of a full channel of children's programs thirteen to fourteen hours per day, seven days per week, to cable systems via satellite.[51]

(e) The licensee of a number of Spanish-language television stations distributes Spanish-language programming to its stations and affiliates by satellite, and it also makes its Spanish-language programming available to cable systems which are not within the service areas of television stations receiving the programming.[52]

(f) Satellite programming in the news and public affairs areas has also commenced. The initial effort

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[48] *Cablevision*, Nov. 6, 1978, p. 45; *CATJ* (Official Journal of the Community Antenna Television Association), September 1978, pp. 24-32.

[49] *Broadcasting*, Apr. 11, 1977, p. 62.

[50] *Broadcasting*, Aug. 21, 1978, p. 48.

[51] "Warner Cable Slates Children's Channel with Quality Fare," *Wall Street Journal*, Dec. 5, 1978, p. 20.

[52] "Cable Operators and Programmers Overshadow Marketing Types at C-TAM Meeting," *TV Communications (TVC)*, Oct. 1, 1978, pp. 58-60.

involves the distribution of still news pictures which change approximately every fifteen seconds and with a voice providing the news information related to the pictures. Both the pictures and the voice-over are supplied by United Press International and they are updated throughout the day with the most recent news developments.[53] A more expansive effort in this area is expected to commence in early 1979 when the Cable Satellite Public Affairs Network is scheduled to begin distributing live coverage of proceedings in the House of Representatives and other public affairs programming.[54] And the party who owns the licensee of WTCG, currently the broadcast signal with the widest satellite distribution, has under consideration a twenty-four hour, live, satellite-fed news service for the cable industry.[55]

(g) On December 15, 1976, the FCC authorized a common carrier lessee of domestic satellite facilities to distribute by satellite the television signal of Station WTCG, a non-network station in Atlanta, Georgia, to cable systems throughout the country.[56] On October 25, 1978, the FCC authorized four common carriers to distribute by satellite the signal of WGN-TV, a non-network station in Chicago,[57] and on November 22, 1978, the FCC authorized a common carrier to distribute by satellite the

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[53] *Broadcasting*, Jul. 10, 1978, p. 36.

[54] *Broadcasting*, May 8, 1978, p. 49; "CATV to Cover Congress Fully," *The New York Times*, May 2, 1978.

[55] *Broadcasting*, Nov. 20, 1978, pp. 70-71.

[56] *Southern Satellite Systems, Inc.*, 62 FCC 2d 153 (1976). Carriage of this signal by cable systems is widespread. MPAA, in a proceeding in which it sought unsuccessfully to restrict the distribution of television signals by satellite, estimated that by June 1977, only six months after satellite distribution of WTCG was authorized, requests to carry WTCG from 672 cable systems serving 1.2 million subscribers had either been granted or were pending. *Motion Picture Associaiton of America, Inc.*, 68 FCC 2d 57 (1978).

[57] *United Video, Incorporated*, FCC 78-766 (released Nov. 9, 1978).

signal of KTVU, a non-network station in Oakland.[58] A number of other applications by common carriers to deliver by satellite the signals of non-network television stations are pending before the FCC, and in order to facilitate the processing of those applications, the FCC has delegated authority to its staff to act on these applications.[59]

Thus, in the short period of time since the commencement of satellite transmission to cable systems, a wide variety of program offerings, many of them consisting of non-broadcast materials whose carriage is not limited by the FCC's distant signal rules, has become available, and more can be expected[60] as even more cable systems install earth stations.[61]

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[58] Letter dated November 22, 1978 from the Chief, Facilities and Services Division of the FCC's Common Carrier Bureau to Satellite Communications Systems, Inc.

[59] *United Video, Inc., supra* note 57, at ¶24, n. 19. Other television signals for which applications are pending for delivery by satellite include the signals of KTTV, Los Angeles, California (Application of Satellite Communications Systems, Inc., File No. W-P-C-2131 and Application of ASN, Inc., File No. W-P-C-2332), WPIX, New York, New York (Application of Southern Satellite Systems, Inc., File No. W-P-C-2168), WSBK-TV, Boston, Massachusetts (Application of Eastern Microwave, Inc., File No. W-P-C-2291), and WOR-TV, New York, New York (Application of United Video, Inc., File No. W-P-C-2265, Application of Eastern Microwave, Inc., File No. W-P-C-2291, and Application of ASN, Inc., File No. W-P-C-2332).

[60] RCA American Communications, Inc. (RCA), whose domestic satellite provides most of the satellite originated programming to the cable television industry, has announced that it plans to launch a third satellite next year. RCA currently provides eighteen channels of programming to cable systems and expects to be able to provide twenty-four channels after launch of its new satellite. "RCA Corp. to Launch Third U.S. Satellite in December 1979 at a Cost of $40 Million," *Wall Street Journal*, Dec. 5, 1978, p. 8.

[61] ACLU questions whether Midwest has standing to challenge some aspects of the FCC's access rules since, according to ACLU, the public record indicates that Midwest does not currently operate at its current 12-channel capacity (ACLU Br. 14), and ACLU has submitted a chart purporting to show the number of channels actually

D. The Eighth Circuit Decision

In a decision entered February 21, 1978, the United States Court of Appeals for the Eighth Circuit ("the Eighth Circuit") filed its decision setting aside the FCC's *1976 Order* and the rules adopted therein. The Eighth Circuit held that the *1976 Order* had exceeded the FCC'S jurisdiction as established by this Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (hereinafter "*Southwestern*") and *Midwest I*. Recognizing that the Act does not specifically provide for the regulation of cable television and that the types of regulation which this Court has affirmed are only those reasonably ancillary to the FCC's authority to regulate broadcasting, (App. 20-31), the Eighth Circuit concluded that the access rules were invalid because they were not consistent with either the statutory objectives of broadcast regulation (App. 32-50) or the statutory means of regulation applicable to broadcasters (App. 50-64).

The Eighth Circuit also discussed First and Fifth Amendment constitutional considerations present in the *1976 Report* which reinforced its conclusion on the jurisdictional issue.[62] In

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transmitted on Midwest's cable systems (ACLU Br. 12, n. 19). The first system listed by ACLU serves Bloomfield and Dexter, Missouri, and has fewer than 3,500 subscribers. It is therefore not subject to the FCC rules here at issue. As to the other systems, ACLU has failed to note that each of them has earth station authorizations, one of which has been in operation for several years, and the remaining of which have recently been authorized and have either just commenced operation or will commence operation in the near future. Thus, as a result of the grant of these earth station authorizations, Midwest is in the process of making selections from the satellite-distributed programming specified above which will in most instances exhaust its remaining activated channel capacity and which will be limited by the requirement in the access rules that one channel be set aside for access purposes. There can therefore be no question about Midwest's standing to challenge the FCC's requirement that cable systems dedicate one channel to access. Moreover, while ACLU was also a party to these proceedings in the Eighth Circuit, it has not explained why it has waited until this late date to challenge Midwest's standing.

[62] The concurring judge did not join in the Eighth Circuit's discussion of constitutional considerations.

concluding that the access rules would be impermissible under the First Amendment, the Eighth Circuit relied on two factors: first, that there was nothing in this case to indicate a constitutional difference between cable systems and newspapers in the context of the government's power to compel access and that an access requirement for newspapers had been invalidated in this Court's decision in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (App. 72-74); and second, that the access rules strip cable operators on their access channels of "all rights of material selection, editorial judgment, and discretion enjoyed by other private communications media, and even by the 'semi-public' broadcast media" (App. 73). With respect to the Fifth Amendment, the Eighth Circuit suggested that the access rules constitute an uncompenstated taking of property (App. 77-79), exposed cable operators to the risk of civil and criminal liability (App. 79-82), and were an unwarranted intrusion into the conduct of a cable enterprise (App. 62).

Finally, the Eighth Circuit indicated that there was a serious question whether the access rules could be sustained on the basis of the administrative record then before it (App. 82-91).

SUMMARY OF ARGUMENT

This Court's decisions in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) and *United States v. Midwest Video Corporation*, 406 U.S. 649 (1972) define the outer limits of the FCC's jurisdiction over cable television. These cases establish the principle that the parameters of the FCC's delegated authority are derived from the broadcasting sections of the Act and the regulatory goals prescribed by those sections. The access rules exceed these outer limits for two reasons. First, the access rules substantially impair the judgment and editorial control of cable systems in selecting among the multitude of available programming, consisting of broadcast signals, locally originated programming, and satellite-delivered programming,

in filling their channels. This impairment is contrary to a fundamental goal of broadcast regulation—the preservation of the values of private journalism and editorial control. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). Second, the access rules compel cable systems to operate as common carriers on their access channels. *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976); *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976). But the effectuation of broadcast related goals by common carrier means is specifically prohibited by Section 3(h) of the Act, 47 U.S.C. §3(h). Since the limits on the FCC's authority over cable systems are derived from the broadcasting sections of the Act, this prohibition is applicable not only to the FCC's regulation of broadcasters pursuant to its direct authority, but also to the FCC's ancillary authority to regulate cable television. In any event, the access rules impose obligations on cable systems so totally different from those heretofore recognized that the decision about whether the FCC has jurisdiction to impose them should be made by Congress, *see, e.g., TelePrompTer Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), which considered a "rewrite" of the Communications Act during the last Session of Congress, H.R. 13015, 95 Cong., 2nd Sess., and will in all likelihood consider the matter further during the current Session.

Cable systems have important First Amendment rights in the selection and origination of programming from the abundance of program material available, and contrary to this Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), the access rules restrict these rights in order to enhance the voices of access users. The principal grounds relied upon to restrict the First Amendment rights of broadcasters—spectrum scarcity and pervasiveness (and the related consideration of accessibility to children)—are not applicable to cable systems, and this Court has rejected economic scarcity and other considerations as a basis for imposing access obligations on news-

papers. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). For First Amendment purposes, therefore, cable systems function like newspapers in offering a variety of services in order to increase subscriptions and should be treated the same under the First Amendment. Moreover, even if the more limited First Amendment rights of broadcasters are deemed applicable to cable systems, this Court's decision in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra*, establishes the importance of editorial control and discretion in the regulation of broadcasting, and *Miami Herald Publishing Co.* v. *Tornillo, supra*, establishes the primacy of editorial control and discretion over whatever values may exist in promoting the self-expression of access users. Thus, whether cable systems are analogized to broadcasters or newspapers or something in between, the access rules violate their First Amendment rights.

The access rules also violate the due process and taking clauses of the Fifth Amendment. Under the due process clause, the government may not compel cable operators to change the fundamental nature of their business and become common carriers, even as a condition to their right to retransmit broadcast signals. *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583 (1926). With respect to the taking clause, the effect of the access rules is to take channels from cable systems for the benefit of access users and to compel cable operators to subsidize a noncompensatory common carrier service, for the presumed benefit of the public, with revenues derived from their private business of retransmitting broadcast signals and other programming. This is a taking under standards recently clarified by this Court in *Penn Central Transportation Company v. City of New York*, 57 L.Ed.2d 631 (1978). Nor can the compensation requirement be satisfied by the presumed ability of cable operators to subsidize access facilities and services with revenues derived from their other business. *Brooks-Scanlon Company* v. *Railroad Commission of Louisiana*, 251 U.S. 396 (1920).

Finally, the access rules are unsupported by record evidence of a public demand for access services. This is not a case like *FCC v. National Citizens Committee for Broadcasting*, 56 L.Ed.2d 697 (1978), where the FCC should be allowed discretion to forecast the direction in which the public interest lies under circumstances where the benefits the FCC is seeking to achieve are not easily quantified. The evidence before the FCC was clearly that there is no significant demand from access users or cable subscribers for access services, even where facilities existed (App. 89-90, n. 87), and the FCC indicated that it was relying on a mere "hope" that demand would develop if more facilities were built (App. 156). A more convincing record of need should be required where the rules impair constitutional rights. *United States v. O'Brien*, 391 U.S. 367 (1968).

ARGUMENT

I. THE ACCESS RULES EXCEED THE FCC'S ANCILLARY JURISDICTION OVER CABLE TELEVISION

A. Midwest I Established the Outer Limits of FCC Jurisdiction Over Cable Television

When the Communications Act was enacted in 1934, cable television technology did not exist and was not foreseen. In *Southwestern*, this Court held that the FCC had jurisdiction to regulate cable television to the extent necessary to prevent it from harming broadcasters and undermining "the effective performance of the FCC's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178. In *Midwest I*, this Court made a quantum jump and affirmed mandatory origination rules which were designed not to protect the scheme of broadcast regulation from the impact of cable television operations but, instead, to make cable operators perform functions analogous to those imposed on broadcasters and originate local programming in order to affirmatively

promote broadcast regulatory goals. These origination rules were upheld by a mere plurality of this Court. The Chief Justice concurred only in the result, stating:

> Candor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts. The almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts. 406 U.S. at 676.

It is clear from this language by the Chief Justice, whose vote was necessary to provide the plurality in *Midwest I*, that the mandatory origination rules represent the outer limits beyond which the FCC may not go in regulating cable television without further legislation. Both the Eighth Circuit below (App. 26) and the D.C. Circuit in *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 28 (1977), *cert. denied*, 54 L. Ed. 2d 484 (1977), have interpreted *Midwest I* as establishing the outer limits of Commission jurisdiction over cable television.

As will be shown below, the access rules go far beyond these limits. They strip cable operators of editorial control and discretion over their channels for reasons unrelated to the effectuation of the broadcast licensing sections of the Act, and they impose common carrier obligations on cable systems. Because these results are contrary to a fundamental goal of broadcast regulation and contrary to a specific limitation on the methods which the FCC may use to achieve broadcast objectives, the access rules exceed the FCC's ancillary jurisdiction over cable television recognized by this Court in *Southwestern* and *Midwest I*.

B. The Access Rules Substantially Impair the Cable System's Editorial Control In the Selection and Presentation of Programming It Delivers to Its Subscribers

The Government alleges (G. Br. 11) that the access rules do not require cable systems to displace broadcast retransmission and pay programming services in favor of providing access, though in a footnote (G. Br. 38-39, n. 33) it does recognize two examples (the only two it can envision) of potential conflicts between cable operator's needs and the demands of access users which might require resolution in favor of the access user. The Government suggests that these conflicts may nevertheless be resolved in favor of the access user. While the Government's examples involve cable systems having a twelve channel capacity, it should be noted that the problems raised in those examples are typical of the kinds of problems that even cable systems with twenty or more channels face under the access rules. Many cable systems are already required by the FCC's mandatory signal carriage rules to carry more than twelve local broadcast signals,[63] and even where there are fewer local broadcast signals available, the programming choices described in the Counterstatement[64] are sufficient now to exhaust the capacity of many cable systems having twenty or more channels. As cable systems and the numbers of persons subscribing to them continue to grow and as new means of program distribution develop, even more programming is likely to be produced. And while these developments are likely to result in cable systems increasing their channel capacity to provide greater programming diversity to subscribers, channel capacity will never be sufficient to present all of the available programming. But whether twelve or twenty or

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[63] Problems raised by the abundance of local broadcast signals having mandatory carriage rights on cable systems in some sections of the country are under consideration by the FCC in its *Notice of Proposed Rule Making in Docket No. 21472*, 42 *Fed. Reg.* 60180 (1977).

[64] *Supra*, pp. 10-18.

more channels are involved, the Government in its examples totally fails to recognize the effect of the access rules on the programming judgment of cable systems, and the Government's discussion of the resolution of even the potential conflicts it recognizes between cable operator's needs and the demands of access users is contrary to plain statements the FCC made in adopting the *1976 Order* and fails to recognize significant problems with its own suggested resolution of those issues.

One of the Government's examples of a potential conflict between the cable operator's needs and the demands of access users involves the cable operator who carries broadcast signals on eleven of his twelve activated channels and who desires to add a twelfth broadcast signal (G. Br. 38-39, n. 33). The Government says that the *1976 Order* "suggests" that the last activated channel would have to be reserved for access and then points out that Section 76.254(c) does not "expressly" provide that the channel reserved for access must be one of the twelve activated channels that can be received without converters. But the FCC has stated explicitly:

> [W]e do not envision certificating new systems *or the addition of new signals* whose carriage is not mandatory to existing systems, if the activated channel capability available for the provision of access services is insufficient to provide at least one full channel for access programming. *1976 Order* (App. 141) (emphasis added).

Thus, it is clear that a system with twelve activated channels carrying eleven broadcast signals could not add one of the broadcast signals now or soon to be available by satellite without installing converters to increase its activated channel capacity.

The Government's other example involves the situation where the cable operator uses eleven channels for broadcast retransmission and pay programming and desires to use the last

activated channel for his own origination services (G. Br. 38, n. 33). According to the Government, the rules "indicate" that the cable operator would have to install converters to activate a thirteenth channel rather than relegate access users to that course. But rather than accepting this result as what the rules require, the Government points to a footnote in the *1976 Order* stating as follows:

> It is our intention that every reasonable effort be made to accommodate the various competing channel uses. It is not our intention that established cablecast services provided by system operators be automatically displaced. While we generally believe that automated services such as time and weather should give way to access uses, if other irreconcilable conflicts between channel uses develop, we are prepared to consider each such situation individually on its merits. We recognize that many of the services provided on these channels, such as community information, consumer price lists, etc., clearly provide a substantial benefit to subscribers. *1976 Order* (App. 143, n. 19).

There are several problems with the Government's approach to this example. For instance, the footnote the Government relies on only refers to "established" cable services, and the Government's example does not involve an established service. Moreover, if the FCC does seek to resolve a conflict between the programming choice of cable operators and the demands of access users, it will be in the position of a national program director, trying to decide whether a particular origination proposal by a cable operator, such as a channel of religious programming, or a channel of sports events from Madison Square Garden, or a channel presenting live debates from the House of Representatives, or a channel of children's programming, should take priority over existing or incipient access efforts. In rejecting the concept of similar ad hoc program judgments under the prime time access rule applicable to television stations, the Second Circuit stated that "*ad hoc*

decisions are not desirable because they suggest a system of censorship. . . ." *NAITPD v. FCC*, 516 F.2d 526, 540 (2nd Cir. 1975). In any event, the FCC has signaled how it would rule on the Government's example:

> [W]e believe access programming should continue to have priority status over operator-originated programming when they compete for the final available channel on a cable system. *Reconsideration* (App. 195).

This subordination of operator-originated programming to access programming is remarkable because origination programming, including everything from coverage of city council meetings, to consumer information, to local high school sports events, to entertainment programming, is the very kind of programming which the FCC required cable operators to present under the mandatory origination rule upheld by this Court in *Midwest I*.

Moreover, if these are the only two potential conflicts the Government has been able to discern between the cable operator's needs and the demands of access, the Government has simply not tried to apply the access rules in the context of programming abundance described in the Counterstatement.[65] There are at least four categories of programming which the FCC has clearly indicated that cable operators may not add if such programming would occupy the last available channel and leave no channel for access uses. The first two, additional distant broadcast signals and non-automated operator-originated programming, have already been discussed.[66] The third is pay programming. Although pay programming being presented on June 21, 1976, the effective date of the access rules, will not be displaced, pay programming may not be added after that date if no channel would be left for access uses:

> We have sought to encourage the presentation of [pay] programming for it provides diversity of viewing

[65] *Supra*. pp. 10-18.
[66] *Supra*, pp. 26-28.

> choices to the public. We do not, however, believe that the public interest will be served if this programming is provided at the expense of local access efforts which are displaced. Should a system operator for example have only one complete channel available to provide access services we shall consider it as clear evidence of bad faith in complying with his access obligations if such operator decides to use that channel to provide pay programming. *1976 Order* (App. 145).

Fourth, the FCC indicated that "automated services such as time and weather channels should give way to access uses" (App. 143).

Other conflicts between the needs of the cable operator and the demands of the access user abound. Consider for example, a twelve channel cable system, which as required by the rules has reserved a channel for access, and carrier Spanish language programming on one channel, religious programming on one channel, and broadcast signals on nine channels. The cable system then learns that access programming on the reserved channel exceeds the usage criteria in Section 76.254(d). Must the cable system take off the Spanish language or religious programming to make room for an additional access channel? Or suppose a cable system is confronted with a demand to lease its vacant channel to a party desiring to present pay programming consisting of movies which largely duplicate a pay programming service offered by the cable operator, and the cable operator desires to present a new and non-duplicative service such as the Madison Square Garden sports events or a channel of news and public affairs programming.[67] Or suppose that a system with a twenty channel capacity has, in accordance with the usage criteria in Section

[67] The FCC has already indicated that it would have trouble deciding in favor of the cable operator in this situation:

> We shall scrutinize the actions of operators who, while providing their own programming, assert that their activated capacity is insufficient to permit the leasing of a channel to potential competitors. *1976 Order* (App. 144-45).

76.254(d), provided four or more access channels, the balance of its channel capacity is utilized for broadcast signals and originated program carriage, and then a new program service (such as the children's program channel described in the Counterstatement[68]) becomes available. Suppose further that marketing and audience surveys show that very few subscribers watch one or more of the access channels but there is a strong subscriber interest in the newly available programming. May the cable operator reclaim one of the access channels for the newly available programming?[69] The rules would seem to resolve most of these questions in favor of the access users, but presumably the Government would argue that those questions also could be brought to the FCC pursuant to the language quoted above in footnote 19 of the *1976 Order* (App. 143, n. 19). But to do so would enmesh the FCC even further in making value judgments between different types of programming. Moreover, if the FCC did decide that a cable operator could reduce the number of access channels in order to present other available and desirable programming, the FCC would be creating a further serious difficulty for itself. With access programming then presented on a smaller number of channels, there would inevitably be disputes about how the cable operator was administering the first come, non-discriminatory aspects of the rules, and the FCC would become enmeshed in resolving these disputes.[70] This would even further cast the FCC in the role of a national program director, choosing between the scheduling requests of competing access users.

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[68] *Supra*, p. 16.

[69] The FCC appears to have already answered this question:

> We do not consider as acting in good faith an operator with a system of limited activated channel capacity who attempts to displace existing access uses with his own origination efforts. *1976 Order* (App. 144).

[70] Similar FCC involvement in the administration of access channels will develop on systems having only one access channel and no additional activated channel capacity if usage of the single access channels grows to such an extent that all of the parties desiring to use the channel cannot be accommodated.

C. The Access Rules Violate a Fundamental Goal of Broadcast Regulation—The Preservation of the Values of Private Journalism and Editorial Control

No delegation of power to a regulatory agency is absolute. There must be standards against which it can be determined whether the agency has exceeded the powers conferred by Congress. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Where Congress gives an agency broad power to adopt such rules and regulations as the public interest requires, the delegation is at least limited by the objectives of the statute. *American Trucking Associations, Inc. v. United States*, 344 U.S. 298, 313 (1953); *NAACP v. FPC*, 425 U.S. 662, 669 (1976).

This Court upheld the mandatory origination rule in *Midwest I* because it would

> . . . "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services . . . ." 406 U.S. at 667-668 (quoting from the FCC's opinion adopting the rule).

The Government argues (G. Br. 26-27) that *Midwest I* controls the jurisdictional issue here because the access rules are designed to serve the very same objectives. However, the Government fails to acknowledge an equally important objective of broadcast regulation—the preservation of values of private journalism and editorial control. Because the access rules compel cable operators to function as common carriers and to abandon editorial control over message content on one or more dedicated access channels, the access rules are antithetical to the statutory goal of preserving these values. And because this goal of preserving values of private journalism and editorial control is at least as important a limitation on the FCC as is the goal of increasing local outlets, the access rules exceed the FCC's delegated power. The origination rule in *Midwest I* was

found to serve the goals of increasing outlets for local expression and diversity of program choices, and it was not inconsistent with the equally important goal of preserving values of private journalism and editorial control. But, it is not enough that the access rules might promote some broadcast objectives if they also contravene other equally important statutory objectives which limit the FCC's power. Therefore, *Midwest I* cannot be dispositive of the jurisdictional issue here.

That preservation of values of private journalism and editorial control is a fundamental feature and objective of the broadcast provisions of the Act, to which the FCC's jurisdiction over cable television is ancillary, is clear from Section 3(h) of the Act[71] and its legislative history, as explained by this Court in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (hereinafter "*Columbia Broadcasting System*"). Section 3(h) provides that

> . . . a person engaged in radio broadcasting [including television by subsequent construction] shall not, insofar as such person is so engaged, be deemed a common carrier.

In *Columbia Broadcasting System*, this Court held that neither the Communications Act nor the First Amendment required broadcasters to accept paid editorial advertisements. The Court discussed the origin of the Communications Act and the specific history of Section 3(h), including rejected proposals to impose access obligations on broadcasters. The Court concluded that Congress had intended to preserve values of private journalism and editorial control:

> Congress pointedly refrained from divesting broadcasters of their control over the selection of voices; §3(h) of the Act stands as a firm congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public. 412 U.S. at 116.

[71] 47 U.S.C. § 153(h).

The Court quoted Professor Alexander Meiklejohn to the effect that

> . . . "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said . . . ." 412 U.S. at 122.

And the Court rejected the view that

> . . . every potential speaker is "the best judge" of what the listening public ought to hear or indeed the best judge of the merits of his or her views. All journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material. 412 U.S. at 124.

Thus, as this Court recognized, values of private journalism and editorial control are at the core of the scheme of broadcast regulation established by Congress. The preservation of these values is an explicit and paramount objective of broadcast regulation. The access rules exceed the FCC's ancillary jurisdiction because they are antithetical to this objective.

It is no answer to argue, as have the petitioners herein, that cable operators have sufficient channel capacity to accommodate access uses without foreclosing other programming options. As shown in the Counterstatement,[72] there are numerous sources of entertainment and informational programming, including news services, from which cable operators can choose if they are not required by the FCC to reserve channels for access uses. If the FCC's purpose in adopting the access rules was to give everyone a chance to be on television, then, of course, the editorial function is irrelevant. But that would be a goal having no basis in the Act. On the other hand, if the FCC's goal is to assure that the important things are said, then selection of voices by the cable operator as editor is essential. The access rules are contrary to that goal and thus exceed the FCC's jurisdiction over cable systems.

[72] *Supra*, pp. 10-18.

D. Cable Systems Do Not Function as Common Carriers But Are Compelled to Do So By the Access Rules

Common carrier status has been defined in the communications context according to two tests.[73] First, a person must hold himself out to carry for all customers indifferently. *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976). This "holding out" test for common carriage has been adopted by the FCC in *First Report and Order in Docket No. 15586*, 1 FCC2d 897, 900 (1965). The second test is that the customer must decide what is to be transmitted. *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976). Thus, the FCC has recognized that a common carrier functions as a "pipeline . . . without affecting or influencing the content of the information communicated." *Multipoint Distribution Service*, 45 FCC2d 616, 618 (1974).

The access rules compel cable operators to provide a common carrier service. Sections 76.254(a) (App. 169-170) and 76.256(d) (App. 173-175) require cable operators to hold their facilities out for public use, and Section 76.256(b) (App. 172-73) prohibits cable systems from exercising program content control on their access channels. Moreover, just as common carrier rates are regulated, the FCC has regulated the rates cable operators may charge for access services. As provided in Sections 76.256(c) and (d) of its rules (App. 173-175), the FCC has provided that one public access channel "shall always be made available without charge"; that the educational and local government access channels must be made available free of charge for five years; and that "an appropriate rate schedule" must be specified for the leased access channel.

[73] For a similar definition in the transportation context, see *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211 (1927); and HUTCHINSON ON CARRIERS §47a (2d ed. 1891).

The Petitioners begrudgingly accept the fact that the access rules impose common carrier obligations on cable systems[74] but seek to make a virtue of necessity. For example, the Government argues (G. Br. 27) that the access rules "fall more clearly" within the jurisdictional limits established in *Midwest I* because cable television's traditional retransmission function is in the nature of common carriage and the carriage of access programming is closer in nature than local origination to this traditional function. Similarly, NBMC argues that the FCC's rules requiring cable systems to carry local television signals already require cable systems to perform a common carrier function (NBMC Br. 35).

Remarkably, at virtually the same time the FCC was participating with the Solicitor General in the preparation of the Government's argument that the traditional function of cable systems is in the nature of common carriage, the FCC released a *Report and Order in Docket No. 20829*, 43 *Fed. Reg.* 53742 (1978), purporting to justify its regulation of the equal employment opportunity practices of cable operators on the rationale that cable operators were *not* merely common carriers with no control over message content. In *NAACP v. FPC*, *supra*, this Court held that the FPC had no authority to regulate the employment practices of the common carriers otherwise subject to its jurisdiction because employment practices were unrelated to the statutory purposes and functions of the FPC. The Court distinguished FCC regulation of the employment practices of broadcasters because of the relationship between the employment profile of a station and the manner in which broadcasters ascertain community needs, which affects the exercise of their programming discretion. In order to demonstrate that cable operators are comparable to broadcasters for the purpose of employment regulation so that it could support its jurisdiction to adopt equal employment opportunity rules applicable to cable systems, the FCC discussed the program-

[74] The Government states that the access rules "can be viewed as a limited form of common carriage-type obligation" (G. Br. 39).

ming discretion of cable operators in detail. It summarized this discussion at ¶16 of its *Report and Order in Docket No. 20829* as follows:

> In sum, both in their signal carriage decisions and in connection with their origination function, cable television systems are afforded considerable control over the content of the programming they provide. And, while this control may vary in kind and degree from the discretion exercised by broadcasters, it is nonetheless extensive and fully adequate to justify our regulatory efforts to ensure that it is exerted in a nondiscriminatory fashion. (Footnote omitted.)[75]

[75] The detailed basis for this conclusion by the FCC in Docket No. 20829 is similar to Midwest's Counterstatement in this Brief. For the Court's benefit, ¶¶14-15 of the FCC's *Report and Order in Docket No. 20829* are quoted below:

> We are not persuaded that the program discretion exercised by cable television operators is so narrowly circumscribed. The Commission's rules, for example, afford every system located outside of all television markets unlimited discretion in choosing its permissive signal complement. This same freedom also applies to all small systems (less than 1,000 subscribers), regardless of market location. Further, in the first 100 markets it is virtually impossible for cable systems to have their entire carriage selection dictated by the rules, and all systems are unrestricted in their carriage of specialty stations. A similarly unfettered choice is available to operators in their carriage of educational stations, as well as in their selection of alternative program sources under the late-night programming provisions of the rules. The suggestion, moreover, that the limited technical availability of signals seriously restricts the scope of these carriage options is difficult to credit. The increasing use of common carrier, CARS and earth station signal importation methods, as well as the regulatory need to limit distant signal carriage in the first place, certainly argue to the contrary. We conclude that cable operators exercise substantial program discretion in the context of their carriage determinations and that such discretion clearly affords the opportunity for discriminatory choices which our EEO rules are properly intended to avoid. The latter point is exemplified with particular force in the case of specialty stations, whose wide availability is especially conducive to achieving our goal of program diversity and is positively encouraged by Commission policy. It seems most unlikely, however, that cable systems engaged in employment discrimination based on ethnic background or religion, for example, would undertake carriage of stations that direct their programming to individuals characterized by the very ethnic or religious traits which the operator has discriminated against in employment.

> Origination programming, of course, provides an even more direct and pervasive form of program discretion than signal selection. And, while it is true that cable systems are no longer required to produce such material, this fact is not jurisdictionally dispositive. The relevant point is that every system may, and contrary to CZR's contention a substantial number of systems do, originate programming. As of September 1, 1977, for example, data compiled by Television Digest, Inc., indicated that out of 3,911 operating systems, 1,097, or 28.04%, offered non-automated origination programming. It is apparent, moreover, that even those systems whose originations consist exclusively of "pre-packaged" premium programming (*i.e.*, "pay-cable") are capable of exerting a form of content control over the material supplied to them by such sources as Home Box Office, Inc. Beyond the fact that systems can initially select pay programming from several alternative sources, they may, and in our experience do, decline to carry particular programs provided by these sources at various times and for various reasons, in much the same manner that television broadcast stations may fail to "clear" programming supplied to them by a national television network. In such circumstances, of course, systems may also select replacement programs and thus engage directly in a programming function. (Footnotes omitted.)

It is clear from this discussion that even the [illegible] has come to realize that because of their "extensive" program discretion, cable systems do not function like common carriers.

Even the requirement in the FCC's rules that cable systems carry the signals of local broadcast stations does not impose a common carrier function. This Court affirmed the FCC's authority to regulate cable television because such regulation was necessary in order to perform its statutory responsibilities for the "orderly development of an appropriate system of local

television broadcasting." *Southwestern*, 392 U.S. at 177. In so concluding, this Court relied in particular on Section 307(b) of the Act,[76] mandating the FCC to distribute broadcast licenses so as to provide a "fair, efficient and, equitable radio service" to each of the States; Section 303(f),[77] authorizing the FCC to adopt regulations preventing "interference between stations and to carry out the provisions" of the Act; and Section 303(h),[78] authorizing the FCC to "establish areas or zones to be served by any station." In affirming the rules requiring carriage of local stations, the Eighth Circuit, relying on this Court's decision in *Southwestern*, stated that "[t]he crucial consideration is that they [cable systems] do use radio signals and that they have a unique impact upon, and relationship with, the television broadcast service." *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (1968). The FCC requirement that cable systems carry local broadcast signals thus effectuates the broadcast licensing sections of the Act and is completely different in both scope and kind from regulations requiring cable systems to hold out their facilities for indiscriminate use by members of the public.[79]

E. The Use of Common Carrier Means to Achieve Broadcast Objectives Is Specifically Prohibited By the Act

As shown above, the access rules impose common carrier obligations on cable systems. These means are utilized to promote the broadcast objectives of increasing local outlets and

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[76] 47 U.S.C. §307(b).

[77] 47 U.S.C. §303(f).

[78] 47 U.S.C. §303(h).

[79] The FCC has long held that the function of retransmitting broadcast signals by cable systems is *not* common carriage. *Frontier Broadcasting Co. v. Collier*, 24 FCC 251 (1958). This view has been approved by the courts. *National Association of Regulatory Utility Commissioners v. FCC*, *supra*, 533 F.2d at 608, n. 26. In *Southwestern*, 392 U.S. at 169, n. 29, this Court stated:

> The Commission and the respondents are agreed, we think properly, that these CATV systems are not common carriers within the meaning of the Act.

augmenting program diversity. The Government defends this choice of means as follows:

> [T]he reasonableness of the means chosen to further those statutory policies clearly depends on the particular characteristics of the communications medium to which they are applied. (G. Br. 30)

To the same effect, NBMC states:

> Thus, cable access is well within traditional Commission actions, but in a mode and manner unique to cable television. (NBMC Br. 21)

Both of these parties approach this case as if the objectives of broadcast regulation were the only limits on the FCC's jurisdiction over cable television.

If the Communications Act did not contain any specific guidance from Congress about the means which the FCC may use to attain broadcast objectives, then it might follow that the objectives themselves were the only standards against which to determine whether the FCC had exceeded its delegated power. *FPC v. Texaco, Inc.*, 417 U.S. 380, 387 (1974); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). However, Section 3(h) of the Act does represent a clear and specific congressional prohibition against using common carrier means to attain broadcast objectives. Therefore, the FCC's delegated power is limited not only by the objectives of the broadcast provisions of the Act but also by congressional specificity as to regulatory methods.

It was not necessary to reach this issue in *Midwest I* because the origination rules did not impose common carrier obligations on cable operators. This explains the Court's focus there on broadcast objectives as the principal consideration limiting the FCC's ancillary jurisdiction over cable television and the Court's failure to discuss broadcast regulatory methods as another limiting factor. Both the Eighth Circuit below (App. 50-53) and the D.C. Circuit in *Home Box Office, Inc.* v. *FCC*, *supra*, 567 F.2d at 31, have indicated their views that the

Commission may not regulate cable television with methods not available for broadcast regulation.[80] Section 3(h) reflects a clear congressional intent to limit the power delegated to the FCC. Other regulatory methods not suitable but not prohibited for broadcasting might be deemed valid with respect to cable television if Section 3(h) or other specific provisions of the Act were not violated, because, in the absence of congressional specificity as to means, the FCC has considerably more flexibility in fashioning regulatory means appropriate for achieving broadcast-related objectives. But here the FCC has chosen a regulatory method which is specifically prohibited in Section 3(h).

It would be anomalous if, in determining the appropriate goals of cable television regulation, the FCC was referred to the broadcast provisions of the Act, while the means specified in the Act as inappropriate for broadcast regulation could then be ignored. And while it should be clear, in light of the language quoted above from the *Columbia Broadcasting System* case, that an access requirement of the kind here involved could not be imposed on broadcasters, the Government seeks to find an opening for access obligations on broadcasters from language in that case and from other sources. Thus, the Government quotes (G. Br. 29, n. 24) the following language from this Court's opinion in the *Columbia Broadcasting System* case:

> Conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of

[80] There is dictum in *American Civil Liberties Union v. FCC*, 523 F.2d 1344, 1351 (9th Cir. 1975), which would appear to support the Government's views on jurisdiction in this proceeding. Midwest does not take issue with the specific holding in that case, *i.e.*, that the FCC was not required to impose full Title II common carrier regulation on cable systems. However, the dictum indicating that the access rules as then in effect were within the FCC's statutory authority to adopt should not be considered persuasive in view of the fact that no party before the court was asserting that the access rules already imposed common carrier requirements on cable systems or was challenging the FCC's authority to do so.

> limited right of access that is both practicable and desirable. 412 U.S. at 131.

The Government also refers (*id.*) to certain instances where it alleges that a kind of limited right of access has been imposed on broadcasters, including the personal attack rule and the requirement in Section 312(a)(7) of the Act that broadcasters provide time for candidates for federal office. But in the two instances cited, the broadcaster is only required to make reasonable time available. With respect to the personal attack rule, the broadcaster can avoid the obligation entirely by simply not broadcasting personal attacks, and under both requirements, the broadcaster retains substantial discretion with respect to both scheduling and the amount of time offered. Moreover, as to both the personal attack rule, *Polish American Congress v. FCC*, 520 F.2d 1248 (7th Cir. 1975), and Section 312(a)(7), *Federal Political Candidates*, 43 Pike & Fischer Radio Regulation 2d 1029 (1978), the FCC relies upon the good faith judgment of the licensee as to what constitutes reasonable time under the particular circumstances involved. Thus, broadcasters do not function like common carriers with no editorial control over their facilities when complying with the personal attack rule and Section 312(a)(7). These very limited obligations therefore do not substantially impair the values underlying Section 3(h) and involve obligations entirely different in both scope and kind from the common carrier obligations imposed by the access rules here involved.[81]

[81] Some of the parties to these proceedings seek to separate the channel capacity, two-way, and equipment availability aspects of these rules from the other provisions of the rules relating directly to the provision and operation of access channels and to analyze each of those aspects separately. But the Government has recognized that the channel capacity rules "were adopted in part to provide the capacity to meet access obligations" (G. Br. 35) and has recognized that the equipment availability provisions of the rules "are more closely tied to the access rules [than are the channel capacity requirements], since they require the availability of equipment for access purposes" (G. Br. 36, n. 32). All of these aspects are interrelated and are discussed jointly in this Brief. The jurisdictional and constitutional considerations in support of channel capacity or equipment availability

F. The Question of the FCC's Authority to Adopt Access Rules Should Be Resolved By Congress

In *TelePrompTer Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), the Court was faced with a situation concerning the status of cable television under the Copyright Law of 1909. The Court stated:

> These shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress. 415 U.S. at 414.

And Congress ultimately responded with new copyright legislation. The situation is similar here. Congress has left this Court in the position of having to define the FCC's jurisdiction over the emerging and developing cable television industry on the basis of a law, the Communications Act of 1934, which was enacted at a time when cable television technology did not exist and was not foreseen.[82] Moreover, the FCC's jurisdiction over cable television was before the last Session of Congress in a "rewrite" of the Communications Act, which was introduced on June 7, 1978,[83] and it would have excluded cable television

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requirements, when not tied to access requirements and when supported by a record showing the need for such requirements, their relevance to broadcast regulatory goals, and their consistency with broadcast regulatory means, would present different questions from those that are before the Court on this record. Here, all three aspects of the FCC's rules are so closely interrelated that they all should be set aside as exceeding the FCC's jurisdiction.

[82] A similar situation was before this Court recently in *Tennessee Valley Authority v. Hill*, 57 L.Ed. 2d 117 (1978), the snail darter case, where the Court again deferred to Congress.

[83] H.R. 13015, 95th Cong., 2nd Sess.

from federal regulation altogether. While there was no final action on H.R. 13015, it is likely that a rewrite will again be introduced during the coming session of Congress.

In an effort to show congressional acquiescence to FCC regulation of cable television, the Government refers (G. Br. 33-34, n. 31) to a few statutes in which Congress has treated cable operators like broadcasters, including the equal opportunities and fairness obligations in Section 315 of the Act, the ban on cigarette advertising, and forfeitures. The Government states:

> These actions confirm Congress' understanding that the Commission is to regulate cable television systems, and certainly do not reflect any congressional objection to the principle of imposing access, equipment availability and channel capacity requirements on such systems. (G. Br. 34, n. 31)

The Government makes too much of these laws. At most, they indicate that Congress has accepted *Midwest I* and recognizes that cable operators may be regulated in the same way as broadcasters. But the access rules go beyond these limits. As to such regulations, Congress has been silent. And by that silence, just as it did by its silence about copyright, Congress has failed to deal with a situation requiring congressional guidance.

G. The ACLU and MPAA Briefs

ACLU argues that Midwest cannot even raise questions relating to multiple access channel requirements because "the demand for public access to the Midwest Video System has not been shown to exceed the capacity of a single otherwise unused channel" (ACLU Br. 15).[84] ACLU's position is untenable for at least two reasons. First, ACLU is in effect arguing that the government can adopt the most absurd rules imaginable so long as, based upon current conditions, the rules would not

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[84] Midwest has already responded to ACLU's related assertion that Midwest's cable system do not currently operate at their current twelve channel capacity. *Supra*, pp. 18-19, n. 61.

immediately be applicable to anyone. But what of the chilling effect of such requirements on the program diversity and programming judgments of cable systems? For example, a cable operator may not purchase and install an earth station to add a channel of satellite-delivered programming if that channel will be subject to displacement by access users. Or a cable system may decide not to invest in converters or new cable to increase activated channel capacity in order to take advantage of satellite-delivered programming if many of the new channels might be preempted for non-compensatory access uses. Second, the FCC itself recognized that "even larger systems typically have difficulty finding access channel users," *Reconsideration* (App. at 191), so it is not surprising that Midwest has not yet been faced with use of multiple access channels. However, if the FCC can adopt rules based on its intuition that usage of access channels will increase,[85] Midwest should also be able to assume that the FCC's intuition will prove correct and be able to show the effect of multiple access channel requirements on cable systems.

Brief note should also be taken of the perplexing Brief filed by Amicus Curiae MPAA. MPAA states that the Eighth Circuit's invalidation of the access rules "eliminates competition, restricts programming choices available to cable viewers and proffers an open and continuing invitation to anti-competitive conduct by the operators of cable systems" (MPAA Br. 3-4). Concern about anti-competitive conduct comes with ill grace from the trade association of the motion picture industry, the antitrust violations of whose members have been chronicled in some detail over literally hundreds of pages of the United States and Federal Reports.[86] MPAA has not alleged even one

[85] The question whether the record in this proceeding supported the FCC's action is discussed *infra*, pp. 64-67.

[86] See, e.g., *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946) (unlawful conspiracy under Sherman and Clayton Acts involving Twentieth Century-Fox Film Corporation and Paramount Pictures, Inc., both of whom are parties to the MPAA Brief); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (unlawful price fixing conspiracy, conspiracy to restrain trade, block booking, blind selling,

instance of anti-competitive conduct on the part of a cable company which has resulted in any of its members not being able to show its products in the marketplace or why, if any cable company engaged in such conduct in the future, the antitrust laws would not provide a fully adequate remedy.

Moreover, while allegedly seeking to insure an opportunity to offer its products in the marketplace, MPAA does not even attempt to deal with the difficulties raised by its position. It extols the virtues of program diversity (MPAA Br. 12), but what happens if each of the six MPAA members joining in its Brief leases a channel on a multi-channel cable system? Such a cable system, which may have increased its channel capacity from twelve to twenty channels to be able to carry sports, religious, or informational programming, would find virtually all of its channels used to show movies. What would be the rights of public, educational or government access users in that situtation? Certainly the MPAA members, with their vast financial resources, could stake claims to these channels before the other access uses envisioned by the FCC developed. Would the FCC again have to make judgments about whether a sixth or fifth or fourth movie channel was more valuable than another public access channel, or religious programming, or the signal of a non-network or speciality or educational station? What of property rights? How, for example, would MCA, one of the parties to the MPAA Brief, react if a Federal Entertainment Commission, operating under a broad statute like the

unreasonable discrimination, etc., involving Columbia Pictures Corporation, Universal Corporation (a subsidiary of MCA, Inc.), Twentieth Century-Fox Film Corporation and United Artists Corporation, all of whom through their parent or successor corporations are parties to the MPAA Brief); *United States v. Loew's Incorporated*, 371 U.S. 38 (1962) (block booking of films to television stations involving Screen Gems, Inc., a subsidiary of Columbia Pictures Industries, Inc., a party to the MPAA Brief); and *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561 (1951) (conspiracy to monopolize and attempt to monopolize, involving Columbia Pictures Corporation, Paramount Pictures, Inc., and Twentieth Century-Fox Film Corporation, all of whom are parties to the MPAA Brief).

Communications Act, ordered movie companies to make their studios and production facilities available for use by the public, either on a compensated or uncompensated basis, one-twelfth or even one-twentieth of the time with a proviso that if the public wanted more use of those facilities, MCA would have to build additional facilities? And what about the First Amendment? How would MCA or any of the other companies joining in the MPAA Brief respond if a Federal Entertainment Commission ordered them to give up editorial discretion or control over a significant portion of the product they sell to the public?[87] If MPAA members would oppose the imposition of any of these requirements on their businesses, why are they supporting the imposition of similar requirements on cable systems and how would they justify their being treated differently from cable systems?

These are the types of questions raised by the FCC's access rules. MPAA has not even attempted to deal with them but has instead simply asserted that it, too, wants to be able to use cable television facilities. But by its failure to even attempt to deal with the types of problems that would be raised in implementing its desire, MPAA has failed to serve the traditional role of an amicus curiae and has burdened this Court with nothing more than a pale paraphrase of the Government's jurisdictional argument.

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[87] In its Brief (p. 8) in *Home Box Office, Inc. v. FCC, supra* note 45, MPAA stated:

> The FCC may not prohibit speech by one medium of expression (pay-cable) in order to "reserve programming" for use by another medium (conventional television).

Then why may the FCC prohibit speech by cable operators in order to "reserve programming" for MPAA's members? MPAA does not even try to answer this question.

II. THE ACCESS RULES ARE UNCONSTITUTIONAL

A. The Access Rules Violate the Free Speech Clause of the First Amendment

1. The Access Rules Substantially Restrict the Speech of Cable Operators

As discussed in detail above[88] and as recognized by the FCC in the language quoted above from its *Report and Order* on regulation of cable television equal employment opportunity practices,[89] cable operators have "extensive" discretion in selecting program material to distribute to their subscribers. Contrary to the arguments of Petitioners (G. Br. 45; NBMC Br. 45-46 and 49-50; ACLU Br. 22, 28), cable systems are not mere conduits without First Amendment rights.[90] The process of selecting program material is an editorial function which lies at the very heart of the First Amendment. *Miami Herald Publishing Co. v. Tornillo, supra,* 418 U.S. at 258 (hereinafter *"Miami Herald"); Columbia Broadcasting System, supra.* Nor can any meaningful line be drawn for First Amendment

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[88] *Supra,* pp. 10-18.

[89] *Supra,* pp. 36-37.

[90] ACLU cites *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973), for the proposition that conduits have no First Amendment rights. In *Pittsburgh Press,* this Court upheld a prohibition against publication by newspapers of employment advertisements in sex-designated columns. However, the Court's rationale was not that the newspapers served a conduit function in publishing such advertisements. Rather, the Court's decision was based on the commercial speech doctrine, which has subsequently been severely limited in *Virginia Pharmacy Board v. Consumer Council,* 425 U.S. 748 (1976); and *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85 (1977). To the extent *Pittsburgh Press* has any continuing vitality, such vitality is limited to two factors not involved here. First, it involved prohibition of speech characterized by this Court as "illegal" because discriminatory. 413 U.S. at 388. Second, as distinguished in the *Virginia Pharmacy Board* case, 425 U.S. at 771-772, n. 24, it involved proposals to enter into commercial transactions rather than dissemination of commercial information.

purposes between entertainment and informational programming. *Winters v. New York*, 333 U.S. 507, 510 (1948); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). Whether cable operators choose to distribute broadcast signals, pay movies, news and information services or other types of satellite-delivered programming, the editorial process by which they make those choices is protected by the First Amendment. Of course, cable systems may also produce their own locally originated programming and, in that way, function as speakers as well as editors. This function is protected by the First Amendment as well.

Moreover, as also discussed in detail above,[91] the access rules restrict the speech of cable systems in a significant and not in a minimal way. The speech of cable operators is restricted because they are deprived of the right to select the programming to be distributed on the access channels or to use those channels for operator-originated programming. In *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), this Court stated:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .

Thus, only if there is some other permissible basis for restricting the speech of cable systems can the access rules be found consistent with the First Amendment.

2. Cable Television Does Not Share the Characteristics of Broadcasting Which Have Historically Justified Limitation of the First Amendment Rights of Broadcasters

Both the Eighth Circuit in this proceeding (App. 72-74) and the D.C. Circuit in *Home Box Office, Inc. v. FCC, supra*, 567 F.2d at 46, have held that cable television systems are indistinguishable from newspapers for First Amendment purposes, and this Court has already held in *Miami Herald* case that public access requirements may not be imposed upon newspapers.[92] The Government argues (G. Br. 46, n. 37) that this Court has recognized a distinction for First Amendment purposes between the print media and electronic media generally. The Government's suggestion is that all electronic media, including both broadcasting and cable television, have limited First Amendment protection. However, this Court's references to the electronic media are all based on the historic treatment of broadcasting. The Court has not heretofore determined the proper treatment of cable television for First Amendment purposes.

There are two principal characteristics which have historically been asserted as justification for regulating broadcasting in ways which limit the First Amendment rights of broadcasters: (1) spectrum scarcity and (2) pervasiveness and the related characteristic of accessibility to children.[93] But neither of

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[91] *Supra*, pp. 25-30.

[92] The Government argues (G. Br. 40) that the *Miami Herald* case is distinguishable because it involved a right of reply statute which was content-related whereas the cable television access rules here at issue are content-neutral. In *Miami Herald*, this Court did discuss one content-related factor, *i.e.*, that newspapers might avoid discussion of controversial issues if such discussion might oblige them to provide access space for replies. But the Court indicated that even if this factor were absent, the access requirement could not "clear the barriers of the First Amendment because of its intrusion into the function of editors." 418 U.S. at 258.

[93] See, generally, Robinson, "The FCC and the First Amendment," 52 MINN. L. REV. 67, 150-63 (1967). Professor Robinson mentions two other characteristics, the unique power and influence of broadcasting and public ownership of the airwaves. But public ownership is closely related to scarcity, and they have been discussed together in this Court's discussion of the First Amendment rights of broadcasters. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Moreover, public ownership is not alone a basis for denying users of a public facility their First Amendment rights. *Southeast Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). With respect to the influence and power of broadcasting, it is difficult analytically to separate this factor from pervasiveness, and in any event, it could only logically justify regulations designed to restrict specific types of speech where such restriction is consistent with the First Amendment and not to justify regulations which limit the editorial discretion of the speaker.

these characteristics can be relied upon as carte blanche for limiting First Amendment rights.

> Rather each regulatory action must be measured against the nature of the telecommunications to ensure that the action in the particular case is justified by that nature. *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 275, n. 32 (D.C. Cir. 1974) (Bazelon concurring).

The Government argues (G. Br. 45-48) that economic barriers to entry make cable television a natural monopoly and limit the ability of other persons to engage in cablecasting in a way which is analogous to the technological scarcity of broadcast frequencies. However, broadcast regulation has historically been based not on economic scarcity, but on technological scarcity.[94] In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 401, n. 28 (1969) this Court declined to reach the question whether economic scarcity alone could justify regulation limiting First Amendment rights, but that question was definitively decided in the *Miami Herald* case. Advocates of the access concept in *Miami Herald* emphasized that economic factors "have made entry into the marketplace of ideas served by the print media almost impossible," 418 U.S. at 251; that these same economic factors have made the print media a natural monopoly with "one-newspaper towns" a dominant feature, 418 U.S. at 249; that in the newspaper industry there is "effective competition operating in only 4 percent of our large cities," *id.* at n. 13, quoting from a task force report; and that affirmative government action was necessary to create access to the print media, 418 U.S. at 251. These arguments were rejected by the Court and *Miami Herald* is therefore determinative that economic scarcity[95] is not a rationale for limiting the First Amendment rights of cable systems.

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[94] *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 210-214 (1943).

[95] The cable television franchise by which local municipalities grant rights-of-way for cable facilities is not comparable to the broadcast license because it is not based on scarcity or any other rationale which would justify limitations on First Amendment rights of cable systems. Most cable television franchises are non-exclusive, Johnson, Leland L. and Botein, Michael, *Cable Television: the Process of Franchising* (Rand Corporation), March 1973, No. R-1135-NSF. While in most instances there is only one cable system in a community, this results from economic rather than legal or technical considerations, and there are instances where more than one cable operator serves the same community. For example, in Bryan and College Station, Texas, where Midwest operates a cable system, there is a second cable system. Even if the scarcity rationale were applicable to the issuance of cable television franchises, for the reasons set forth *infra*, pp. 53-55, it would not save the access rules from First Amendment challenge. In any event, *local* ownership of rights-of-way cannot justify *federal* regulations.

With respect to the pervasiveness of broadcasting and its accessibility to children, *FCC v. Pacifica Foundation*, 57 L.Ed 2d 1073 (1978), involving the FCC's authority to regulate indecent programming on broadcast stations, is the primary example of the kind of regulation justified on this basis. *See also, Capital Broadcasting Company v. Mitchell*, 333 F.Supp 582, 585-586 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972), where the cigarette advertising ban applicable to electronic but not print media was upheld against an invidious discrimination charge under the Fifth Amendment because of accessibility to children. Cable television does not have the pervasiveness of broadcasting, since it serves only 17.6 percent of the nation's television households,[96] but even if it did, that characteristic is unrelated to the objectives of the access rules. Pervasiveness and accessibility to children have no logical relation to and have never been relied upon to justify regulation which limits the exercise of editorial discretion rather than the prohibition of specific and limited types of speech. Indeed, affirmance of the access rules on the basis of pervasiveness would undercut one of the principal purposes sought to be achieved by the Court in

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[96] G. Br. 4, n. 3. Even in communities where cable systems are in operation, there are many households which do not subscribe. The need to have cable extended to the home and pay a monthly subscription fee is a further indication that cable television does not have the pervasiveness of broadcasting.

Pacifica—the protection of children from indecent material. Absent the editorial discretion removed from cable systems by the access rules, they have no way of preventing the dissemination of indecent or otherwise objectionable programming to children.[97]

Thus, the principal characteristics of the broadcast media which have been relied upon to limit the First Amendment rights of broadcasters are not applicable to cable television. The conclusion flowing from this fact—that cable systems should be accorded the same First Amendment rights as newspapers—is supported by a number of relevant similarities between cable systems and newspapers. As noted above, though there is only one newspaper or cable system in most communities, this results in both cases from economic rather than technological considerations. Though the pages of a newspaper can be increased to make room for the additional material a right of access might produce, this Court has recognized the economic constraints involved in increasing the number of newspaper pages and the impairment of editorial discretion that would result from an access regulation that might require an increase in the number of pages. The Court has therefore not accorded First Amendment significance to the ability of a newspaper to increase the number of pages it prints.[98] The economic constraints on

[97] In a few instances, access programmers have presented programming most cable operators would consider objectionable for viewing by children. *See, e.g.*, "What's All This on TV?", *New York Times Magazine*, May 27, 1973, p. 9. Without the access rules, the cable system is accountable to its subscribers for the way in which it has exercised its editorial discretion.

[98] In *Miami Herald*, 418 U.S. at 256-257, this Court stated:

> The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available. (Footnote omitted.)

cable systems increasing the number of channels they offer and the resulting impairment of their editorial discretion from access obligations are at least as great as those affecting newspapers. Newspapers offer a number of pages or sections appealing to different types of audiences—*e.g.*, comics, sports, society, local news, national and international news, editorial comment and analysis—in an effort to increase their readership. Similarly cable systems offer a number of channels appealing to different types of audiences—*e.g.*, religion, sports, information services, entertainment—in an effort to increase the number of subscribers to their services. Both the newspaper editor and the cable system owner make editorial judgments in selecting these materials and presenting them to their subscribers. Thus, aside from cable television's dissimilarity to those aspects of broadcasting which justify limits on the First Amendment rights of broadcasters, cable systems operate in a manner similar to newspapers for First Amendment purposes, and arguments for limiting the First Amendment rights of cable systems have already been rejected with respect to newspapers. Since there is no basis for treating cable systems differently from newspapers for First Amendment purposes, based upon the *Miami Herald* precedent this Court should affirm the Eighth Circuit's conclusion that the access rules violate the First Amendment rights of cable systems.

3. The Access Rules Would Violate the More Limited First Amendment Rights of Broadcasters

Even if this Court should conclude that the more limited First Amendment protection accorded broadcasters applies to cable television as well, however, the access rules are not consistent with the First Amendment.

As shown above with reference to this Court's opinion in *Buckley v. Valeo*,[99] the effect of the access rules is to exalt the First Amendment interest in promoting individual self-expression by access users above the First Amendment interest in editorial controls by cable operators. The Government has argued:

> [T]he access rules do not present a question of subordinating First Amendment interests to other, unrelated, governmental interests. Rather, to the extent they can be regarded as affecting the First Amendment interests of cable operators, they present a question of competing First Amendment interests. (G. Br. 40)

It should be noted that the D.C. Circuit in *Business Executives' Move for Vietman Peace v. FCC*, 450 F.2d 642, 655 (1971), held that the First Amendment value of individual self-expression affirmatively *required* broadcasters to provide a right of access to their facilities, and this holding was reversed by this Court in the *Columbia Broadcasting System* case. Although this Court in *Columbia Broadcasting System* explicitly declined to reach the question whether the First Amendment would *preclude* the FCC from imposing an access obligation on broadcasters, 412 U.S. at 119, it emphasized the paramount importance of editorial control. The Court clearly indicated that it is less important that everyone have an opportunity to speak than that "everything worth saying shall be said." 412 U.S. at 122, quoting Professor Meiklejohn. And the Court clearly indicated that the editorial function of selecting voices is essential in this regard. The paramount importance of the editorial function was reaffirmed in *Miami Herald*. Thus, the conflict between the competing First Amendment values of promoting individual self-expression and preserving editorial control has already been resolved in favor of preserving editorial control.

For this reason, the access rules could not have been imposed even on broadcasters with their more limited First

[99] *Supra*, p. 48.

Amendment rights. By the same token, they may not be imposed on cable operators, whose First Amendment rights are at least as great as those of broadcasters.

B. The Access Rules Violate the Fifth Amendment

1. Under the Due Process Clause, a Person May Not Be Compelled to Undertake Common Carrier Obligations

A person voluntarily undertaking a business which has the attributes of common carriage may be required to submit to regulation of that business as a common carrier. But may one who has not voluntarily entered the common carrier business be compelled to do so, just because he owns or can build facilities suitable for that purpose? This question was not raised in this form in *Midwest I*. There it had been argued that, just as the FCC could not compel the provision of broadcast services, the FCC similarly could not compel cable operators to engage unwillingly in cablecasting. The Court responded:

> [T]he analogy respondent thus draws between entry into broadcasting and entry into cablecasting is misconceived. The Commission is not attempting to compel wire service where there has been no commitment to undertake it. CATV operators to whom the cablecasting rule applies have voluntarily engaged themselves in providing that service, and the Commission seeks only to ensure that it satisfactorily meets community needs within the context of their undertaking. 406 U.S. 670.

Thus, the Court found that the mandatory origination rule was not fundamentally different from the nature of the business cable systems undertook in providing broadcast signals to their subscribers. The access rules, however, do fundamentally change the nature of a cable system's business by requiring cable systems to function as common carriers.

At the outset, it should be made clear that Midwest's arguments that the acess rules violate the First Amendment and the due process and taking clauses of the Fifth Amendment cannot be avoided merely by the FCC conditioning the right of cable operators to retransmit broadcast signals upon the requirement that cable operators also provide access services. It is well established that the government may not extend a governmental benefit only to those who are willing to accept the imposition of an otherwise unconstitutional condition. As this Court stated in *Frost & Frost Trucking Co. v. Railroad Commission,* 271 U.S. 583, 594 (1926) (hereinafter "*Frost*"):

> If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Accord: Shapiro v. Thompson, 394 U.S. 618 (1969); *Sherbert v. Verner,* 374 U.S. 398 (1963); *Speiser v. Randall,* 357 U.S. 513 (1958). *See* Note , 117 U.PA.L.REV. 144 (1968); and Note, 73 HARV. L. REV. 1595 (1960).

In *Frost,* this Court also decided that the state could not condition use of its highways by motor carriers on the requirement that they serve all members of the public indescriminately on a common carrier basis rather than choosing to contract with particular shippers.[100] The Court stated:

> [C]onsistently with the due process clause of the 14th Amendment, a private [contract] carrier cannot be converted against his will into a common carrier by mere legislative command. . . . 271 U.S. at 592.[101]

[100] Even the motor carrier provisions added to the Interstate Commerce Act in 1935 allow motor carriers to choose between serving particular shippers on a contract carrier basis or holding themselves out to serve the general public on a common carrier basis. See Sections 203(a)(14) and (15) of the Interstate Commerce Act, 49 U.S.C. §303(a)(14) and (15), recodified in P.L. 95-473 (Oct. 13, 1978) as 49 U.S.C. § 10102(11) and (12).

While the mandatory origination rule in *Midwest I* was affirmed by this Court over a due process challenge, this Court first determined that the rule there before it was consistent with broadcast regulatory goals and was therefore within the context of the cable system's initial undertaking. But *Frost* continues to stand for the proposition that the imposition of common carrier obligations is a fundamental change in the nature of a non-carrier business which violates the due process clause. The access rules impose common carrier obligations on cable systems,[102] and therefore this case falls squarely within even the narrowest reading of *Frost.*[103]

[101] In *Watson* v. *Employers Liability Assurance Corporation,* 348 U.S. 66, 82 n. 3 (1954) (Frankfurter concurring), an apparent inconsistency was noted between the 1926 *Frost* case and *Pierce Oil Corp.* v. *Phoenix Refining Co.,* 259 U.S. 125 (1922). In *Pierce,* this Court upheld an Oklahoma statute requiring oil pipelines to operate as common carriers, as that statute applied to pipeline companies which had entered the state after the statute was enacted, on the ground that the pipeline companies had voluntarily waived their due process rights when they entered the business aware of the statute. The same acquiescence rationale cannot apply to Midwest or other parties which entered the cable television business before the FCC adopted the access rules. Moreover, this voluntary acquiescence rationale stated by the Court in *Pierce* in 1922 must be deemed superseded by the unconstitutional condition concept which was established in *Frost* in 1926 and has been repeatedly affirmed since then. See cases cited *supra,* p. 56.

[102] *Supra,* p. 34.

[103] The Eighth Circuit also concluded that the due process rights of cable systems were violated by the exposure of cable systems to criminal and civil suits for programming presented on access channels because cable systems have no authority under the rules to prevent the presentation of programming that might result in such liability (App. 79-82). Midwest agrees with the Eighth Circuit's analysis, which the Government has not even tried to rebut.

2. The Access Rules Take the Property of Cable Operators Without Just Compensation

The access rules take the property of cable operators because of investments required by 1986 in order to meet the minimum channel capacity requirement; because of investments required immediately for program production equipment which must be maintained locally for access users; because existing cable plant must be used or held available for the distribution of access programming even if the cable operator has other uses for it; and because cable operators are precluded from using their property for their private purposes.

The only aspect of the mandatory origination rule before this Court in *Midwest I* that was remotely comparable to the access rules presented here was the requirement that cable operators invest in program production equipment, since such equipment would have been necessary to comply with the mandatory origination rule. The Court did not find a taking issue in *Midwest I*, but there is a substantial difference between the impact of the equipment requirement under the mandatory origination rule and the access rules. Under the mandatory origination rule, the FCC gave consideration to the problem of compensation for this investment. There was no prohibition against making charges to others who might be permitted to use the equipment. Even if the cable operator used the equipment himself, the FCC permitted the sale of advertising to meet origination costs. In its *First Report and Order in Docket No. 18397*, 20 FCC 2d 201, 215 (1969), adopting the mandatory origination rule, the FCC stated:

> After consideration of the comments, we have concluded that advertising should be permitted at natural breaks in originations with no interruption of program continuity. It appears that advertising support (or some other revenue besides regular subscriber fees) may be necessary to contribute to the financing of local origination in some communities, in view of what the record

> reveals as to the cost of origination equipment and operating expenses.

Here, in contrast, no charges can be made for use of program production equipment for "live public access programs not exceeding five-minutes in length" (App. 173), and the cable operator will obviously have no opportunity to sell advertising during the programming of such access users. Moreover, other costs associated with the access rules, such as the cost of increasing channel capacity, the use of existing channel capacity for public, educational and government access, and the use of the cable system's playback facilities and personnel to present public access programming, will be uncompensated.

The Government argues (G. Br. 49-51) that the access rules do not constitute a taking under standards recently clarified by this Court in *Penn Central Transportation Company v. City of New York*, 57 L.Ed.2d 631 (1978) (hereinafter "*Penn Central*"). In *Penn Central*, 57 L.Ed.2d at 648, the Court quoted its earlier statement in *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960), that the purpose of the taking clause is to

> . . . bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole.

The Court also recognized in *Penn Central*, 57 L.Ed.2d at 651, that

> . . . Government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute "takings."

This is precisely what the access rules do. The FCC believes that it is in the public interest to have available a medium for use by members of the public for self-expression. Cable operators have facilities suitable for this purpose. The FCC, by its access rules, has taken these facilities for public use but has required the cable operators alone to bear the costs.

The Government's argument is essentially that no taking has occurred because the economic-impact of the access rules on cable operators is minimal.[104] This argument is based on at least two considerations. First, the FCC deferred the deadline for compliance with minimum channel capacity requirements until 1986 because it was anticipated that most systems would naturally be rebuilt by that time in any event as a result of equipment obsolescence or a desire to expand channel capacity to accommodate new services (App. 153-161). Second, the FCC made the access rules applicable only to systems of 3,500 or more subscribers so that the cable operator could pass through the costs to subscribers and the incremental cost to each subscriber would be relatively small (App. 113-115).

With respect to the "natural rebuild" concept, if cable operators do increase their channel capacity by 1986 because of equipment obsolescence or a desire to accommodate the new programming services, the same taking problem will exist when the rebuild is completed because cable operators will still be required to provide uncompensated service, to forego the commencement of services which presently exist or may develop between now and the completion of a rebuild, and to displace programming which they have selected for their channels to accommodate access uses. Delaying the taking until 1986 does not eliminate it, and in any event at least one channel is taken immediately.

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[104] The Government appears to argue that since there has been no physical invasion of a cable system's property by the government, there can be no taking (G. Br. 50-51). The Court in *Penn Central*, however, recognized that physical invasion was not necessary for there to be a taking and that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose . . ., or perhaps if it has an unduly harsh impact on the owner's use of the property." 57 L. Ed. at 650. It also considered in that case "whether the interference with appellant's property is of such a magnitude that 'there must be an exercise of eminent domain to sustain [it].'" 57 L. Ed. at 656, citing *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). Moreover, there was no physical invasion in *Penn Central*, and there is a physical invasion here in that pursuant to government command cable systems must permit an intrusion of their property by access users.

With respect to the possibility of spreading the costs of compliance over a larger number of subscribers to reduce the per subscriber impact, the FCC is in effect recognizing that there are substantial economic burdens associated with the rules, and that these burdens can only be borne by larger systems. But the Government has cited no authority for the proposition that a burden on a business can be ignored because the business can pass the burden on to its customers. This argument also ignores the fact that there may be price resistance to passing on the burden[105] and the fact that the ability of the cable system to pass on the burden may be impaired by the cable system's inability, because of the access rules, to assemble the most desirable program package and thus attract a greater number of subscribers.

The Court's decision in *Penn Central* was based on treating the landmark preservation law there involved like a zoning ordinance because "the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan." 57 L.Ed.2d at 653 (footnote omitted). Thus, the owners of the Grand Central Terminal were not "solely burdened", and indeed they were benefitted, like "all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole. . . ." 57 L.Ed.2d 655.

Clearly the access rules do not involve the application of a comprehensive plan analogous to zoning cases. The landmark preservation law in *Penn Central* applied to over 400 structures in the City. The access rules on the other hand, single out the property of the cable operator in the community to benefit

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[105] From time to time there may be other constraints, such as the President's current voluntary Wage-Price Guidelines, that inhibit a price increase to pass on the burden of providing access channels. In addition, many cable systems need the approval of their local franchising authorities to increase their rates.

those members of the general public who desire an opportunity to use the cable facilities for access program presentation. Moreover, whereas the majority opinion in *Penn Central* found that landmark owners reciprocally benefitted from the law, cable operators derive no reciprocal benefit from the access rules, and in fact they suffer an actual detriment because they cannot offer what they believe to be the most desirable combination of programming on their channels in order to attract the largest number of subscribers. In short, the access rules are not within any recognized exception to the taking clause and therefore do constitute a compensable taking.

It is also clear that the access rules do not provide compensation for the taking. With the exception of leased access channels, the FCC has not allowed cable operators to even attempt to recover their expenses through rates to be paid by access users. On the contrary, the FCC expects cable operators to fund noncompensatory access services with revenues received from subscribers to other cable services. *1976 Order* (App. 113-115). In other words, the FCC expects cable operators to subsidize a noncompensatory common carrier service with revenues derived from their private non-common carrier business.

In *Brooks-Scanlon Company v. Railroad Commission of Louisiana,* 251 U.S. 396 (1920) hereinafter ("*Brooks-Scanlon*"), a company operated a small business as a common carrier by railroad as an incident to its sawmill and lumber business. Although the railroad business showed a loss, the net result of the whole enterprise, including the sawmill and lumber business, was profitable. On this basis, the state commission decided that Brooks-Scanlon could not discontinue its railroad service. This Court reversed, stating:

> The plaintiff may be making money from its sawmill and lumber business, but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it. 251 U.S. at 399.

Brooks-Scanlon continues to be cited for the principle that a company may not be required to subsidize a noncompensatory common carrier service with revenues from its non-carrier business. *City of New York v. United States,* 337 F.Supp. 150, 156 (E.D.N.Y. 1972); *Brooklyn Eastern District Terminal v. United States,* 302 F.Supp. 1095, 1100 (E.D.N.Y. 1969); *Atlantic Coast Line R. Co. v. Public Service Commission,* 77 F. Supp. 675, 683 (E.D.S.C. 1948).[106] In analogous situations, the FCC has held that communications common carriers may not subsidize even one common carrier service with revenues from another. In its *Memorandum Opinion and Order in Docket No. 18128,* 61 FCC2d 587, 589 (1976), *reconsideration,* 64 FCC2d 971 (1977), *further reconsideration,* FCC 78-104 (released Feb. 24, 1978), the FCC established basic rate-making principles for communications common carriers and stated that "the public interest is not generally served by interservice cross subsidization." See also *Computer Use of Communications Facilities,* 28 FCC2d 267 (1971), *affirmed in pertinent part sub nom. GTE Service Corp. v. FCC,* 474 F.2d 724 (2d Cir. 1973), where the FCC adopted rules requiring communications common carriers wishing to provide data processing services to do so through a separate corporate entity with separate books of account, personnel, and equipment, so that the data processing service would not be cross-subsidized from revenues from

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[106] In one respect, *Brooks-Scanlon* has been superseded by later cases. The opinion in *Brooks-Scanlon* indicated that a railroad common carrier could not be compelled to continue a segment of its overall common carrier business at a loss even though other segments were profitable. 251 U.S. at 399. It has since been established that each segment of an integrated railroad common carrier business need not show a profit. *In re Erie Lackawanna Railway Co.,* 517 F.2d. 893, 898-899 (6th Cir. 1975). For example, when a railroad common carrier seeks authority to abandon an unprofitable segment of its operation, the Interstate Commerce Commission can look to the overall profitability of the carrier's railroad business in deciding whether the carrier can be compelled to continue the segment of service. But nothing in the *Erie Lackawanna* case can be interpreted as holding that the ICC can look to the railroad's ability to subsidize the service with unrelated revenues derived from a non-carrier business.

communications common carrier services. Thus the *Brooks-Scanlon* doctrine and related FCC actions make it clear that revenues derived from the non-carrier aspects of a business cannot constitute compensation for the provision of a compelled non-compensatory common carrier service rendered for the presumed benefit of the public.

There is an additional aspect of the access rules which, as applied to Midwest, further highlights the confiscatory nature of the access rules. When the FCC first imposed access obligations on cable operators, it limited their applicability to systems in the top 100 markets. As a *quid pro quo*, such systems were permitted to import more distant signals (App. 106) than cable systems in smaller markets where Midwest operates. Midwest contends that this *quid pro quo* is also invalid under *Brooks-Scanlon* because it requires cable operators to subsidize noncompensatory common carrier services with revenues from a private business expected to be enhanced by the carriage of additional distant signals. But even if the *quid pro quo* for top 100 systems would have been deemed sufficient compensation under the taking clause, that approach was abandoned when the FCC made the access rules applicable to all cable systems with 3,500 subscribers regardless of market location. Midwest's systems are not located in top 100 markets and Midwest does not receive the benefit of any "bonus" distant signals.

III. THE RECORD BEFORE THE FCC WAS INSUFFICIENT TO SUPPORT THE ADOPTION OF THE ACCESS RULES

The Government has argued (G. Br. 31-32 n. 29) that there was record evidence of "significant demand" for access channels, referring to comments in the rulemaking proceeding which showed that the city and county schools in San Diego, California, were using educational access channels and also referring to a survey by the National Cable Television Association which showed that 36 of 145 cable systems surveyed indicated that their access channels were used regularly for an

average of 18 hours weekly. On the other hand, the Eighth Circuit summarized the record before the FCC as follows:

> The record of the *1976 Report* is replete with comments that, though there was "awareness" of access programs, few people with something to say were interested in producing them; that almost no one wants to watch in many segments of our vast country; that when access had been tendered it had not been used and had been rejected by subscribers; that offers of access had been declined by schools which owned television equipment for its use; that a survey of 149 cable systems showed their access channels, offered under the *Cable Report* rules, went unused an average of 92% of the time; that another survey of 10,000 subscribers showed 97% disinterested in viewing access programs if they cost $1.75-$2.00 per month; that access programs had been voluntarily provided when subscriber interest warranted them. There was no evidence that ordinary market demand could never result in access programs, or that a solemn silence would descend in the absence of mandatory access rules. There was no evidence that programs of so little interest or value that no one and no group is willing to purchase time to present them would garner viewers. (App. 89-90 n. 87)

Indeed, as the Eighth Circuit noted (App. 86-88), the FCC itself explicitly and implicitly recognized that there was insufficient evidence of demand. The FCC explicitly found that access channels "are at best sporadically programmed," *1976 Order* (App. 138), and that "even larger systems typically have difficulty finding access channel users," *Reconsideration* (App. 191). Furthermore, by choosing to mandate the construction and dedication of channels rather than relying on a voluntary response to marketplace forces, the FCC implicitly recognized that there was no meaningful evidence of demand for access services. Thus, rather than being based on any showing of demand or need for access channels, the FCC relied on its

"hope" that its requirements for rebuilding cable systems and reserving one or more channels for access would "foster the provision of such services. . . ." *1976 Report* (App. 156).

This hope is belied by experience. In abandoning the mandatory origination rule approved in *Midwest I*, the FCC confessed the futility of seeking to mandate local programming when economic considerations did not justify it. *Report and Order in Docket No. 19988*, quoted *supra*, p. 2. The access rules suffer the same deficiency. As indicated in the Eighth Circuit's summary of the rulemaking comments, quoted above, experience shows that available access channels go unused 92% of the time. A demand for access services cannot be created by law. If there is demand, cable systems will respond to the call of the marketplace.

The Government argues on the basis of this Court's opinion in *FCC v. National Citizens Committee for Broadcasting*, 56 L.Ed.2d 697, 726 (1978), that the FCC should be allowed discretion to forecast the direction in which the future public interest lies. In *National Citizens Committee*, this Court upheld newspaper-broadcast cross-ownership restrictions designed to promote competition and diversity of voices. The Court stated that the FCC was entitled to rely on its judgment about the probability of diverse viewpoints from commonly-owned communications media without requiring evidence of specific abuses because the benefits of competition are by nature not easily quantified. 56 L.Ed.2d at 715. In contrast, the demand for cable television access services is quantifiable and even the FCC recognized that the clear weight of the evidence before it was that there is no significant demand for such services. In this critical aspect, the FCC's access rules are distinguishable from the newspaper-broadcast cross-ownership rule at issue in *National Citizens Committee*.

There is a second basis for distinction as well. The newspaper-broadcast cross-ownership rule did not raise a taking issue because even in cases where divestiture was required,

the divestiture would be by sale and the purchase price would satisfy the compensation requirement. In contrast, it has been shown above[107] that the access rules do raise a taking issue. Where a possible unconstitutional taking is involved, the Court should be less inclined to uphold rules on the basis of mere hope and intuition.

Finally, the FCC's reliance here on hope and intuition unsupported by any record evidence raises a serious problem in connection with the First Amendment issue. As discussed above,[108] by requiring cable operators to reserve channels for access uses, the FCC has violated the operators' First Amendment right to use the channels for programming they selected or produced. In *United States v. O'Brien*, 391 U.S. 367, 377 (1968), this Court held that a government regulation which affects First Amendment rights cannot be sustained unless it furthers an important or substantial government interest and the incidental restriction on First Amendment rights is no greater than is essential to achieve the government interest. In the rulemaking context, these requirements translate into a need for a convincing record. *Home Box Office, Inc. v. FCC, supra*, 567 F.2d at 50. While Midwest has in its First Amendment argument shown that the access rules involve more than an incidental restriction on its First Amendment rights, there is in any event no convincing record of need or demand for access services sufficient to outweigh the restriction on the First Amendment rights of cable operators.

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[107] *Supra*, pp. 58-64.
[108] *Supra*, pp. 47-48.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit setting aside the access rules and the related channel capacity and equipment availability requirements should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

MIDWEST VIDEO CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

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1. Respondent Midwest Video Corporation, in contending that the Commission lacks statutory jurisdiction to promulgate the channel capacity, access and equipment availability rules under review (Resp. Br. 22-46), does not dispute that these rules are designed to promote the long recognized statutory objectives of increasing programming choices for the public and the number of outlets for community expression.[1] Nor does it dispute that *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972) ("Midwest Video I"), held that the Commission's jurisdiction over cable television, which is grounded in the broad jurisdictional grant of Section 2(a) of the Communications Act of 1934, 47 U.S.C. 152(a), extends at least to rules designed to further those

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[1]Amici Teleprompter Corporation, *et al.* take essentially the same position as respondent Midwest. Unless otherwise indicated, our discussion here applies to the arguments of both respondent and amici.

objectives. Respondent nevertheless advances two arguments in support of its contention that the Commission lacks jurisdiction. Neither argument supports its conclusion.

a. First, respondent contends that while these rules may be designed to further the statutory objectives discussed in *Midwest Video I*, they are beyond the Commission's jurisdiction because they contravene another statutory policy—namely "the preservation of values of private journalism and editorial control" (Resp. Br. 31). The rules contravene that policy, respondent asserts, because they "substantially impair the cable system's editorial control in the selection and presentation of programming it delivers to its subscribers" (Resp. Br. 25; see generally Resp. Br. 25-33).

Assuming respondent's premises—that preservation of journalistic discretion is a pertinent statutory policy in the context of cable television and that the rules here significantly impair that discretion—the principal flaw in respondent's argument is that it goes not to the Commission's jurisdiction but to the wisdom of the rules and the correctness of the Commission's judgment concerning the rules' impact on, or contribution to, various statutory policies and the public interest generally. When a statute contains several policies and objectives and authorizes an administrative agency to promulgate rules in furtherance of them, it is the function of the agency to determine whether the rules will promote those objectives. And to the extent there may be a tension among different statutory policies, it is the agency's function to weigh the various interests that will be affected. The function of courts in reviewing the kind of rules promulgated here is to determine whether the agency's assessment reflects "a rational weighing of competing policies" and is "based on consideration of the relevant factors." *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 803 (1978). As this Court

stated in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224 (1943), "[i]t is not for us to say that 'the public interest' will [in fact] be furthered or retarded by the * * * [regulation]." See also *Midwest Video I*, *supra*, 406 U.S. at 674-675.

The fact that rules which promote certain statutory objectives may have an impact on other statutory objectives does not, however, mean that an agency is without jurisdiction to weigh the interests and promulgate the rules. That should be particularly evident with respect to the statutory policy on which respondent relies—"the preservation of values of private journalism and editorial control." Many rules promulgated by the Commission—whether they apply to broadcasters or cable systems—could be viewed in some degree as curtailing journalistic discretion; *i.e.*, discretion to operate in a way prohibited by the rules. The fairness doctrine, the personal attack rule, and the mandatory origination rule upheld in *Midwest Video I* are only a few examples. That those rules may have an impact on "values of private journalism and editorial control" does not deprive the Commission of the statutory authority to enact them.

If respondent's "jurisdictional" argument is viewed merely as an attack on the rationality of the rules under appropriate standards of judicial review, it should be rejected.[2] The Commission's assessment of the various statutory policies and its judgment that the rules will further those policies and the public interest were rational and based on a consideration of the relevant factors.

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[2]As noted in our opening brief (page 15 n.16), the court of appeals expressly did not decide whether, under appropriate standards of judicial review, the Commission's rules should be set aside as arbitrary or capricious (App. 91), although the opinion makes clear the court's view that the rules are unwise and indicates that the court's statutory jurisdiction holding, like respondent's argument, was based largely on that view. See App. 42-53 and our opening brief at 31-32.

Respondent is incorrect in claiming that the impact of the rules on "private journalism" and "editorial control" are so great as clearly to outweigh the objectives the rules are designed to promote. As we show in our opening brief (pages 10-13, 37-40), the rules impose a limited burden on cable systems that is content-neutral and that has little, if anything, to do with journalistic discretion. They do not require any system to displace existing broadcast retransmission or pay programming services. While the rules may require a system to reserve one of its activated channels[3] for access services and prevent it from using that channel for programming that it might otherwise desire to present, that requirement does not affect "private journalism" or "editorial control" in any substantial or meaningful sense. Indeed the rules affect those interests even less than the fairness doctrine or the mandatory origination rule, since they do not relate to the programming presented by the system operator.[4] Although the Commission carefully considered the burdens that the rules would impose on cable systems (App. 131-161)—and substantially modified its original, 1972, access requirements to mitigate the burdens—it reasonably concluded that, in light of all of the relevant statutory policies, the benefits of the 1976 rules outweigh their costs.

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[3]For a 20-channel system that provides converters to its subscribers, that means one out of twenty channels. As amici Teleprompter, *et al.* note (Br. 19 n.76), the newer cable systems generally do provide converters to their subscribers. For systems that do not provide converters, the rules require the reservation of one out of 12 channels.

[4]The access rules do not curtail the cable operator's discretion to select among available programming and to decide which of those programs it will offer to its subscribers (in contrast, for example, to the signal carriage rules, which prohibit or restrict the transmission of certain signals and which the courts have correctly upheld; see *Midwest Video I, supra*, 406 U.S. at 659 n.17). Rather, they at most impose an economic cost on the operator's decision to provide additional programming. If the requirement that one channel be reserved for access would otherwise prevent an operator from presenting programming that he would like to, he is free to add an additional activated channel to his system to present that programming.

b. The second reason respondent advances in support of its contention that the access rules are beyond the Commission's statutory jurisdiction is that the access rules impose a common carriage obligation on cable systems allegedly in contravention of Section 3(h) of the Communications Act, 47 U.S.C. 153(h), which provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier" (Resp. Br. 34-41). That contention is incorrect for two reasons.

First, the rules under review here do not convert cable systems into common carriers within the meaning of the Act. At most they can be viewed as requiring cable systems to permit a small portion of their facilities to be used for purposes analogous to common carriage. But the rules do not subject cable operators to common carriage regulation under Title II of the Act, which would include tariff filing, rate regulation, and full dedication of facilities to common carriage. Under these

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Furthermore, although respondent argues that cable operators, in selecting among all available programs, exercise journalistic functions comparable to those of broadcasters (see Resp. Br. 29-34), this Court rejected a similar contention, with respect to retransmission of broadcast programming, in *Teleprompter Corp.* v. *CBS*, 415 U.S. 394, 409-410 (1974). There, in holding that the retransmission of distant broadcast signals by cable systems was not a copyright infringement, the Court rejected the argument that a cable operator's exercise of "choice and selection among alternative sources * * * brings it within the scope of the broadcaster function" (415 U.S. at 409), and it accepted the argument of cable operators that "[e]ven in exercising its limited freedom to choose among various broadcasting stations, a CATV operator simply cannot be viewed as 'selecting,' 'procuring,' or 'propagating' broadcast signals as those terms were used in [*Fortnightly Corp.* v. *United Artists Television*, 392 U.S. 390 (1968)]." 415 U.S. at 410.

rules, cable systems will function largely as before, and the overwhelming portion of the services provided to subscribers will be those chosen by the operator. Thus, even if Section 3(h) were applicable to cable television, the rules would not "dee[m]" cable operators to be common carriers in violation of that section.[5]

Second, the provision in Section 3(h) that broadcasters shall not be deemed common carriers is, in any event, not a limitation on the Commission's jurisdiction over cable television. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), established that the Commission's

[5]As one court has noted, the purpose and meaning of the "common carrier" definition in Section 3(h) is not entirely clear. *National Association of Regulatory Utility Commissioners* v. *FCC*, 525 F. 2d 630, 640-642 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976). The principal purpose of the provision that broadcasters shall not be deemed common carriers appears to have been Congress' desire that broadcasting should be a field of free competition, and thus that broadcasters should not be subject to the extensive controls, including rate regulation, that Title II of the Act imposes on common communciations carriers. See *United States* v. *Radio Corp. of America*, 358 U.S. 334, 349 (1959); *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940). That is not to say, however, that Section 3(h) was intended to prohibit the Commission from imposing any requirement on broadcasters, not entailing regulation under Title II, that could be analogized to the function of a common carrier. As we noted in our opening brief (pages 25-26, 29 n.24), the Commission and the Act have imposed certain access requirements on broadcasters and cable operators that could be analogized to a common carrier function—for example, the personal attack rule, requiring stations to furnish access to a person attacked during a broadcast; 47 U.S.C. (Supp. V) 312(a)(7), requiring broadcasters to provide time for candidates for federal office; and the signal carriage rules that require cable systems to carry, upon request, the broadcast signals of local broadcasters. Indeed, in *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94 (1973), this Court recognized the limitations imposed by Section 3(h) (412 U.S. at 108-109), but also noted that the Commission "may devise some kind of limited right of access [pertaining to broadcasters] that is both practical and desirable" (*id.* at 131), and specifically noted the Commission's proposed access rules for cable television (*ibid.*).

jurisdiction over cable television extends at least to prescribing rules that are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Midwest Video I* further explained that the concept of "reasonably ancillary" jurisdiction included rules requiring CATV affirmatively to " 'further the achievement of long-established regulatory goals in the field of television broadcasting * * *' " (406 U.S. at 667-669, quoting from *First Report and Order in Docket 18397*, 20 F.C.C. 2d 201, 202 (1969)). Nothing in the decisions in *Southwestern Cable* or *Midwest Video I*, however, suggests that the Commission's statutory authority to promote those goals may be exercised only by means that are appropriate or permitted for the regulation of broadcasters; nor would such a holding make sense.

While there are similarities between cable television and television broadcasting, there are also obvious and significant differences between their functions and capacities. Accordingly, a regulation which may be reasonable as applied to one might be quite unreasonable as applied to the other. Respondent acknowledges (Br. 40) that "regulatory methods not suitable * * * for broadcasting might be deemed valid with respect to cable television * * * " and it may be presumed that Congress, when it enacted the Communications Act, was also aware that the reasonableness of particular regulatory methods would depend on the characteristics of the particular communications medium to which they were applied. There is thus no reason to assume that when Congress enacted a provision expressly limiting the means by which the Commission would regulate "a person engaged in radio broadcasting," it intended the same limitation to apply to the regulation of other forms of electronic communication by wire or radio. To the contrary, as this Court stated soon after the Act was enacted (*FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)),

"[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."

2. Respondent also contends that the access rules violate the First Amendment rights of cable operators (Br. 47-55). Like the court of appeals, respondent relies primarily on *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), and argues that cable television systems are indistinguishable from newspapers for purposes of the First Amendment. We have discussed at some length in our opening brief (pages 36-49) the significant differences between the rules involved here and the statute invalidated in *Miami Herald* and between cable systems and newspapers and other print media. We rely primarily on that discussion and only emphasize here two significant distinctions that respondent has overlooked or misapprehended.

First, the barriers facing someone who would communicate to the public by newspaper are primarily economic. The barriers facing someone who would communicate by cable television are not, as respondent contends (Br. 50-52), merely economic; the necessary placement of cables over and under the public streets entails substantial physical constraints and uses of public property that are characteristic of public utilities and other natural monopolies. Indeed, those considerations have been held to justify state and local franchising and regulation of cable systems as public utilities (see *TV Pix, Inc.* v. *Taylor*, 304 F. Supp. 459 (D. Nev. 1968), aff'd, 396 U.S. 556 (1970)), and they can prevent some persons who might be willing and economically able to do so from constructing and operating their own cable television systems.

A second and related distinction between cable television systems and newspapers or other print media concerns the availability of effective alternative means of communication. Persons and groups denied access to a newspaper or magazine have reasonably effective and relatively inexpensive alternatives for communicating their views in print; for example, by direct mailing or dissemination of handbills. In contrast, there is no practical way to engage in cablecasting without access to a cable system. Respondent, like the court of appeals, overlooks those significant distinctions when it claims that cable operators are no different from newspapers for First Amendment purposes.

3. Respondent also claims (Br. 55-64) that the access rules constitute a taking of property without just compensation. That contention is incorrect.

In *Penn Central Transportation Co.* v. *New York City*, No. 77-444 (June 26, 1978), this Court noted that drawing the line between regulation and a compensable taking has often "proved to be a problem of considerable difficulty" (slip op. 17). Although the general purpose of the Just Compensation Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)), this Court "quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons." *Penn Central, supra*, slip op. 17. The Court identified several factors having particular significance (*id.* at 18):

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment

> backed expectations are of course relevant considerations. See *Goldblatt* v. *Hempstead*, [369 U.S. 590, 594 (1962)]. So too is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by Government, see, *e.g.*, *Causby* v. *United States*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

In this case those factors indicate that the limited burdens imposed by the access regulations are not ones that justice and fairness require the public as a whole to bear, but rather constitute reasonable adjustments of "the benefits and burdens of economic life to promote the common good."

First, the governmental action in this case cannot "be characterized as a physical invasion by Government." Rather it is simply part of the Commission's regulation of an industry having many of the characteristics of an interstate public utility. The Commission's "comprehensive mandate" and "expansive powers" to regulate that industry are well established. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219 (1943); *Southwestern Cable*, *supra*, 392 U.S. at 173. It is also well established that the states and the federal government have the constitutional power to restrict the profits of such industries to a reasonable rate of return without offending the Just Compensation Clause. See, *e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 768-770 (1968). Although the Commission does not regulate the rates of cable operators—and indeed has declared that the states are preempted from regulating the rates for pay cable services[6]—there is no claim that the access rules will

[6] *Brookhaven Cable TV, Inc.* v. *Kelly*, 573 F. 2d 765 (2d Cir. 1978), petitions for cert. pending, Nos. 77-1835 and 77-1845.

prevent a reasonable rate of return. The fact that an economic burden, which is imposed on an industry that is constitutionally subject to regulation of its profits, does not deprive it of a reasonable rate of return supports our submission that the regulation here is not a compensable taking. Rather it is a reasonable condition imposed on entities that have chosen to provide a public service that is properly subject to governmental regulation.[7]

Second, the economic impact of the rules is minimal, and far less than that of other governmental actions held by this Court not to constitute compensable takings. See *Penn Central*, *supra*, and cases cited at slip op. 25. The principal costs associated with the rules that were initially

[7] Although most taking claims arise in the context of restrictions on the use of property, the factors identified in *Penn Central* are also relevant in determining whether regulations imposing affirmative duties with respect to the use of property constitute compensable taking. See, *e.g.*, *Atchison, T. & S.F.R. Co.* v. *Public Utilities Commission*, 346 U.S. 346 (1953) (requirement that a railroad share the cost of constructing a motor vehicle underpass held not to be a taking). The access rules may also be analogized to requirements that have been imposed on real estate developers to set aside portions of their property for roads of a certain size, parks or recreational facilities for the public, which have generally been upheld against taking challenges. See, *e.g.*, *Associated Home Builders* v. *City of Walnut Creek*, 4 Cal. Rptr. 3d 633, 484 P. 2d 606 (1971); *Jenad, Inc.* v. *Village of Scarsdale*, 18 N.Y. 2d 78, 218 N.E. 2d 673 (1976).

Respondent's reliance (Br. 56-57) on *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583, 594 (1926), is misplaced. There the Court invalidated a state law requiring private contract motor carriers to operate as common carriers, purportedly as a condition of their right to use the highway. Whether or not *Frost* remains good law (see *Watson* v. *Employers Liability Assurance Corp.*, 348 U.S. 66, 82 n.3 (1954) (Frankfurter, J., concurring)), the statute involved there is wholly different from the rules under review here. First, an individual private contract motor carrier does not have the characteristics of a public utility. Furthermore, the statute in *Frost* required full dedication of the carrier's business to common carriage, in contrast to the limited access obligation imposed by the Commission's rules.

promulgated in 1972 arose from the requirement that all systems in the top 100 markets provide twenty activated channels by March 31, 1977, and designate four of those channels for access uses. Those rules would have required many systems to engage in expensive rebuilding and to provide converters to their subscribers. In the *1976 Order*, the Commission largely eliminated those costs by extending the deadline for most systems to 1986, by permitting operators to combine access uses on fewer than four channels, and by eliminating any requirement that systems provide converters (see App. 131-141, 148-161). Thus the principal remaining costs associated with the rules promulgated in the *1976 Order* are, first, the marginal cost of maintaining and transmitting at least one channel of access programming, and, second, the opportunity cost of foregoing more lucrative uses of that channel (or of activating an additional channel for those more lucrative uses). The first cost is insignificant, and respondent does not contend otherwise. The second is necessarily speculative; for example, respondent acknowledges that its systems are not presently operating at their 12-channel capacity, though it alleges that they soon will be (Resp. Br. 18-19 n.61). But, in any event, that opportunity cost is analogous to—and far smaller than—the opportunity cost of the landmark preservation that this Court in *Penn Central* held not to constitute a taking.

Third, the rules do not significantly interfere with investment backed expectations. As noted, respondent does not contend that the rules will prevent it from making a reasonable return on its investment. And it is significant in this respect that the rules under review replaced the mandatory origination rule upheld in *Midwest Video I*, which the Commission repealed in 1974 on the ground, urged by cable operators, that it was more economically burdensome than the access rules. *Report*

and Order in Docket 19988, 49 F.C.C. 2d 1090, 1099-1100, 1104-1106 (1974).[8] Furthermore, while the requirement that at least one channel be available for access to some degree curtails cable operators' rights with respect to a small portion of their property, it does not significantly interfere with their "primary expectation concerning the use of [that property]" (*Penn Central, supra*, slip op. 30)—namely the right to use their facilities almost entirely for their own purposes and profit.

Finally, it is significant that the rules under review here do not require cable systems to perform a service, or permit the use of their property for a purpose that is unrelated to the function that they have voluntarily undertaken to perform. The reasons given in *Midwest Video I* for rejecting a similar taking challenge by respondent to the mandatory origination rule are equally pertinent here (406 U.S. at 670):

> The Commission is not attempting to compel wire service where there has been no commitment to undertake it. CATV operators to whom the cablecasting rule applies have voluntarily engaged themselves in providing that service, and the Commission seeks only to ensure that it satisfactorily meets community needs within the context of their undertaking.

As we have noted in our opening brief (pages 27-28), the provision of access services is even more closely related

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[8] It is also significant that the Commission has preempted state and local regulation of the rates charged for pay cable services for the purpose of encouraging development of those services. See *Brookhaven Cable TV, Inc.* v. *Kelly*, 573 F. 2d 765 (2d Cir. 1978), petitions for cert. pending, Nos. 77-1835 and 77-1845.

than the mandatory origination rule to the services that cable systems have voluntarily undertaken to provide and, contrary to respondent's claim, there is no basis for distinguishing the access rules from the origination rule for purposes of the Just Compensation Clause.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed and the order of the Commission affirmed.

Respectfully submitted.

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JANUARY 1979

DOJ-1979-01

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1575

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

MIDWEST VIDEO CORP., *et al.*,
Respondents.

No. 77-1648

AMERICAN CIVIL LIBERTIES UNION,
Petitioner,

v.

MIDWEST VIDEO CORP., *et al.*,
Respondents.

No. 77-1662

NATIONAL BLACK MEDIA COALITION,
CITIZENS FOR CABLE AWARENESS IN PENNSYLVANIA AND
PHILADELPHIA COMMUNITY CABLE COALITION,
Petitioners,

v.

MIDWEST VIDEO CORP., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE OF THE MOTION PICTURE ASSOCIATION OF AMERICA

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No. 77-1662

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Citizens for Cable Awareness in Pennsylvania and
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BRIEF AMICUS CURIAE OF THE MOTION PICTURE ASSOCIATION OF AMERICA

Motion Picture Association of America, Inc. and Columbia Pictures Industries, Inc., MCA Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, United Artists Corporation and Walt Disney Productions (hereinafter collectively referred to as "MPAA") hereby submit their brief *amicus curiae* pursuant to Rule 42 of the Rules of the Supreme Court. MPAA's brief is in support of the position taken by petitioner Federal Communications Commission. Written consent to the filing of this brief has been obtained from all parties and has been submitted contemporaneously.

INTEREST OF AMICUS

MPAA is a group of companies who are actively engaged in the production or distribution, or both, of programs for network television and syndication to local television stations, theatrical motion pictures and motion pictures and other programs for cable television. They represent a major segment of the creative forces in the television, motion picture and cable television industries. The rules struck down by the court below, insofar as they mandate the availability of channel space on cable television systems for commercial lease, are of vital importance to the above-listed MPAA members because of the role they play in opening a new marketplace for program product. Affirmance of the decision of the court below will adversely affect these MPAA members' ability to expand and develop this marketplace.

PRELIMINARY STATEMENT

The member companies of MPAA are actively engaged in the distribution of motion pictures to cable television systems. Films licensed to cable televison operators are of-

fered to viewers on a separate "pay" channel.[1] Unlike motion pictures broadcast by conventional television broadcast stations, these films are generally offered to subscribers uncut, unedited and uninterrupted by commercial advertising messages.

At present, virtually all cable system operators which offer pay programming provide only one channel of "pay" programming to their subscribers. If cable system operators are permitted to determine whether the "pay" channel is offered, and if so, to control this channel free from regulatory restraint, there would be no competition in the market for the exhibition of movies to cable subscribers. Thus, cable operators, with their natural geographic monopoly, would have the unfettered ability to deny viewers a choice and to restrict the quantity and quality of programming reaching viewers in their community.

The rules adopted by the Commission and here under review prevent such monopolistic and anti-competitive control of a new communications medium by cable system operators. These rules require, *inter alia*, that cable systems with more than 3,500 subscribers have a minimum capacity of 20 channels, 46 CFR §76.252(a), and that such systems provide leased accessed channels on a non-discriminatory basis, 47 CFR§76.256(d)(3).[2]

By invalidating these rules, the decision of the court below eliminates competition, restricts the programming choices

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[1] Regular cable service generally consists of the retransmission of several television broadcast signals and some other services such as time and weather channels, public access, and perhaps local origination, all for a set monthly fee. "Pay" cable is an extra channel of originated programming offered to existing subscribers to the regular service for an added monthly fee.

[2] These rules were adopted by the Commission in its *Report and Order in Docket No. 20508*, 59 FCC2d 294 (1976). This decision amended and modified the original rules which had been adopted in 1972. See *Cable Television Report and Order*, 36 FCC2d 143 (1972).

available to cable viewers and proffers an open and continuing invitation to anti-competitive conduct by the operators of cable systems. Without access, no program supplier can be guaranteed a reasonable opportunity to offer his products in the marketplace. Such a result frustrates the promise of cable television which, with its abundance of channel capacity, is ideally suited to providing diverse programming to both mass and specialized audiences.

ARGUMENT

A. Retention of the Commission's Access and Channel Capacity Rules is Vital to Insuring Competition and Program Diversity on Cable Television.

The cable television industry today has expanded far beyond its original function as a community master antenna system in areas where off-air television reception was poor and limited to one or two local stations.[3] Satellites, earth stations and greater channel capacity have all contributed to a growing demand for originated programming and other services, in addition to the retransmission of broadcast signals. Cable television thus presents enormous potential for the creation and dissemination of vast new quantities of diverse programming. But because of the natural monopoly nature of cable systems, a regulatory scheme mandating reasonable access for all program suppliers is vital to the realization of this goal.

[3] In 1968, when this Court decided *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968), there were some 2,000 operating cable systems serving 2,800,000 subscribers. As of the beginning of 1978, there were an estimated 4,000 cable systems serving in excess of 13,000,000 television homes according to the 1978 *Television Factbook*. Thus over 17% of the nation's television homes are now served by cable television.

The statutory mandate of diverse programming and a competitive marketplace is clear. Fulfillment of that mandate via cable television turns on the utilization of cable's unlimited channel capacity. Broadcast television is limited by the scarcity of spectrum space and by the dominance of the three national networks. Thus the further expansion of the quantity and variety of program offerings to the public was largely at an end until the advent of cable television's program origination capability. Cable, with its potential for unlimited channel capacity, and thus multiple originated programs, creates a new and exciting opportunity for original programming to serve diverse needs and interests.[4] Program producers, large and small, national and local, could have a totally new outlet to the public.

But this scenario cannot be enacted unless certain regulatory conditions are met, and they will not be met if the decision of the court below is allowed to stand. Cable television is undeniably an integral part of the national telecommunications scheme. Cable systems are natural geographical monopolies. There is only one system per community. Without required nondiscriminatory access cable operators possess virtually unlimited anticompetitive powers. They would be empowered to exercise total control over all originated programming on every channel on their systems. The goals of program diversity and competition cannot be achieved under such a scheme. These goals can only be realized by a guarantee of reasonable access to cable channels for the producers of programming. Access means that programmers, and cable operators, can originate programming on

[4] The birth of "pay" cable is generally recognized to have been in 1972. In 1973, ten cable systems provided a pay service to some 16,000 subscribers. From this base several pay cable services have grown to serve about 2,400,000 subscribers on 789 cable systems as of June 30, 1978, according to *The Pay TV Newsletter* of October 5, 1978. The take-off growth spurt in this service can be marked from mid-1975 when the Commission first began authorizing statellite receiving stations to cable systems. According to Commission data there are now some 600 such stations authorized and this figure is increasing at a rate of about 25 per week.

cable systems, and that subscribers can receive this programming. Otherwise, cable television will become a medium where only the cable operator chooses what his subscribers could see. "Television of abundance" would be an unfulfilled dream and the promise of diversity and competition would not be realized.

Present day marketplace conditions support the scenario described above. Cable operators determine whether or not originated programs will be presented. Where the decision is affirmative today, virtually all cable operators offer only one "pay" channel to their subscribers. By controlling access to this one "pay" channel, they set the terms and conditions on which pay programming may be made available in their communities. A program supplier has no choice. He must either meet the cable operator's terms and conditions or lose the opportunity to have his programming distributed in the marketplace. A cable operator may have no incentive to offer a first originated channel, much less a second or third channel of "pay" programming to his subscribers since such multiple channels would divert audience and diminish the economic potential of the original "pay" channel controlled by the cable operator.

The Commission rules under review are clearly reasonable and appropriate measures properly designed to preclude monopoly control of cable channels by the possessor of that natural monopoly, the cable operator. The lower court's holding should be reversed.[5]

The importance of the Commission's rules in this area will grow markedly as more new services begin to compete in the marketplace. The interests of the providers of new services

[5]Absent preemptive federal regulation, burdensome local regulation is also sure to arise. For example, in the past there have been local efforts to prohibit pay cable. In addition to its effect on program diversity, this points up the need for national uniformity.

will not always coincide with those of cable system operators, nor with each other. The order, uniformity and marketplace access aspects of the Commission rules under review are therefore clearly necessary to insure continued orderly growth.

B. The Commission's Rules are Well Within its Statutory Authority and Serve the Highest Objectives of the Communications Act.

Not only are the rules necessary for the practical reasons outlined above, they are entirely consistent with the regulatory goals the Commission is charged with carrying out under the Communications Act of 1934, as amended. 47 U.S.C. §151-609. Section 2(a) of the Act, 47 U.S.C. §152(a), empowers the Commission to regulate "all interstate and foreign communication by wire or radio." and Section 4(i), 47 U.S.C. §154(i), enables it to "make such rules and regulations, not inconsistent with this Act, as may be necessary in the execution of its functions." The Commission is directed by Section 303(g), 47 U.S.C. §303(g), to "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."[6] In short, the Commission is given broad powers to regulate those entities which constitute a part of the national telecommunications scheme.

In *U.S. v. Southwestern Cable, supra*, this Court held that cable systems engage in "interstate communication by wire or radio" within the meaning of Section 2(a), and therefore that the Commission has the authority to regulate cable television, at least to the extent that the regulation is "reasonably ancillary" to the regulation of broadcasting. 392 U.S. at 178. That case involved the carriage of broadcast signals by cable systems. In *U.S. v. Midwest Video Corp.*

[6] See also 47 U.S.C. §§151, 307(b).

(Midwest I) 406 U.S. 649 (1972), this Court approved the Commission's regulation of cable television beyond the signal carriage area. In upholding rules mandating local origination by cable systems over a certain size, this Court said that the Commission could regulate cable so as to "promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." 406 U.S. at 667. The Court noted that such objectives include the increasing of local outlets for self-expression and promoting programming diversity. *Id.* at 667-669.[7] And, of course, the courts have recognized that the Commission's duty to stimulate diversity is the "paramount" goal under the Communications Act. *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1970); *NAITPD v. FCC*, 502 F.2d 249 (2d Cir. 1974), and 516 F.2d 526 (2d Cir. 1975).

Applying the above test to the rules at issue in this case, it seems clear that the court below erred. The Commission quite specifically adopted those rules for reasons which included those approved in *Midwest I*. Thus, when the rules under review were adopted in 1976, amending the original 1972 rules, the Commission stated:

> First, we continue to believe that the public interest can be significantly advanced by the opening of cable channels for use by the public and other specified users who would otherwise not likely have access to television audiences. A commitment was made to the provision of these channels in the 1972 Rules which should not be abandoned. There is, we believe, a definite societal good in keeping open these channels of communication. While the overall impact that use of these channels can have may have been exaggerated in the past, nevertheless we believe they can, if properly used, *result*

[7] See *NBC v. United States*, 319 U.S. 190 (1943).

> *in the opening of new outlets for local expression, aid in the promotion of diversity in television programming*, act in some measure to restore a sense of community to cable subscribers and a sense of openness and participation to the video medium, aid in the functioning of democratic institutions, and improve the informational and educational communications resources of cable television communities. 59 FCC2d 294, 296 (emphasis added).

The access and channel capacity rules are thus clearly aimed at "increasing the number of outlets for local self-expression and augmenting the diversity of programs and types of services available to the public." *First Report and Order in Docket No. 18397*, 20 FCC2d 201, 202 (1969). This was conceded by the court below (App. A, p. 39 and n. 45); however, the court attempted to distinguish *Midwest I* by saying that there had to be a nexus between the cable regulations under review and the Commission's broadcasting industry duties. It said that the access rules have nothing to do with the retransmission of broadcast signals *(Southwestern)*, or with requiring cable systems to do what broadcasters do *(Midwest I)*. In the course of its analysis the court stated that it could not justify the invocation of otherwise valid objectives to impose regulations when the means used do not square with the statutory powers of the Commission. The court also characterized the access rules as common carrier regulation which, it said, the Commission cannot apply to broadcasters.

It is submitted that the court's rationale is plainly in error. The court would restrict the Commission's regulation of cable to that which is used in the broadcast area. However, this Court did not restrict the Commission in *Midwest I* from pursuing common statutory objectives for cable and broadcasting via different methods. All *Midwest I* required was that the regulation "*promote the objectives* for which the

Commission ha[s] been assigned jurisdiction over broadcasting." 406 U.S. at 667 (emphasis added). There can be no doubt that the objectives which the access rules are designed to promote are legitimately applicable to broadcasting as well.[8] The program origination requirement in *Midwest I* and the access regulations at issue here are both designed to stimulate the growth of cable televison as part of a national broadcast communications system in which television viewers will have available the broadest possible range of programming and other services. The availability of leased channels on a non-discriminatory basis creates the necessary marketplace environment for the growth and development of diverse program sources. The potential public benefit is immeasurable and the present program suppliers are only the first generation of entrepreneurs who stand ready to translate this potential into reality.

Furthermore, although we submit that it is not necessary to reach this question in order to uphold the Commission, it is not at all clear that the Commission cannot impose some form of access on broadcasters. In *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973), which was an appeal from the Commission's refusal to mandate a limited right of access in broadcasting, this Court observed that "at some future date . . . the Commission . . . may devise some kind of limited right of access that is both practicable and desirable." *Id.* at 131.[9] See also 47 U.S.C. §315; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

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[8] See *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (1978), where the Second Circuit upheld the Commission's preemption of state and local regulation of pay cable rates. Applying the test from *Midwest I* the court found that a "policy of permitting development free of price restraints at every level is reasonably ancillary to the objective of increasing program diversity . . .". *Id.* at 767."

[9] It should also be noted that, in the *CBS* opinion, this court took note of the then-pending cable access rules as a way of providing "increased oportunities for the discussion of public issues." 412 U.S. at 131.

Nor is *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.,) *cert. denied*, 434 U.S. 829 (1977), supportive of the opinion below. To the contrary, there the court struck down rules which sharply restricted the program content of pay cable on a series of independent grounds; and there the Commission's regulatory goal was the restriction of program diversity, not its enhancement as in the case under review. Here, the Commission's access rules are specifically designed to promote program diversity, a goal sanctioned by this Court in *Midwest I* and by the court in *HBO*.

On the jurisdictional question, the D.C. Circuit reviewed *Southwestern* and *Midwest I* and correctly stated the test for judicial review as follows:

> . . .we think the Commission must either demonstrate specific support for its actions in the language of the Communications Act *or at least be able to ground them in a well-understood and consistently held policy developed in the Commission's regulation of broadcast television.* 567 F.2d at 28 (emphasis added).

The court then found that the Commission failed to make the required showing for its pay cable "anti-siphoning" rules because it had "not established its jurisdiction on the record evidence before it." 567 F.2d at 34. But the court also felt constrained to note the limits of its holding, saying:

> We do not hold that the Commission must find express statutory authority for its cable television regulations. Such a holding would be inconsistent with the nature of the FCC's organic Act and the flexibility needed to regulate a rapidly changing industry. However, we do require that at a minimum the Commission, in developing its cable television regulations, demonstrate that the objectives to be achieved by regulating cable television are also ob-

> jectives for which the Commission could legitimately regulate the broadcast media. 567 F.2d at 34.

It is manifest that the jurisdictional test of *Midwest I* and *HBO* has been met in the case under review. Regulations designed to promote "the opening of new outlets for local expression [and] diversity in television programming" are certainly "objectives for which the Commission could legitimately regulate the broadcast media." Nowhere did the *HBO* court say that identical regulatory tools must be used to pursue these otherwise legitimate objectives. Furthermore, the *HBO* court stressed in support of its holding on the jurisdictional issue that the FCC's antisiphoning rules were not a reflection of a "well-understood and consistently held policy developed in the Commission's regulation of broadcast television." 567 F.2d at 28. The opposite is true here. Indeed, the Ninth Circuit has had occasion to face this question, albeit in the context of an allegation that the access rules do not go far enough. *American Civil Liberities Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975). That court held:

> The Commission's failure to impose common carrier obligations on access channels *and its imposition of the [1972 access rule]. . .are actions 'reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting.'* 523 F.2d at 1351 (emphasis added).

CONCLUSION

For the reasons set out above, MPAA urges this Court to reverse the decision of the Eighth Circuit and sustain the regulations of the Federal Communications Commission. The Commission's action falls well within the parameters of *Midwest I* and constitutes reasonable and necessary regulation in order to assure the open development of a new competitive marketplace for the suppliers of programming.

Respectfully submitted,

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November 16, 1978

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 77-1575, 77-1648 and 77-1662

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,
Petitioners,

v.

MIDWEST VIDEO CORPORATION, *ET AL.*,
Respondents.

Brief Amici Curiae of

TELEPROMPTER CORPORATION
NATIONAL CABLE TELEVISION ASSOCIATION, INC.

CAPE COD CABLEVISION CORP.
COMMUNICATIONS PROPERTIES, INC.
CONTINENTAL CABLEVISION, INC.
SAMMONS COMMUNICATIONS, INC.
SUMMIT COMMUNICATIONS, INC.
TELECABLE CORP.
TELE-COMMUNICATIONS, INC.
TELEVENTS, INC.
UA-COLUMBIA CABLEVISION, INC.
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VALLEY VIDEO SERVICE CO.
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In Support of Respondents*

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*Amici are filing this Brief with the consent of all parties, whose letters of consent have been filed with the Clerk.

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INTRODUCTION

The question posed by this case is crucial to the future of cable television and of mass media in the United States: May the Federal Communications Commission — consistent with the First Amendment and the limited jurisdiction over cable television implied in the Communications Act — require a cable television operator to provide "access" services on a first-come, first-served basis with no control by the cable operator over content?

We submit that the question must be answered in the negative. The FCC's access rules convert cable television operators into common carriers. Yet the FCC's authority to regulate cable television is only ancillary to its authority to regulate broadcasting, and the Commission is prohibited by statute from regulating broadcasters as common carriers. Moreover, the FCC's rules, by denying cable operators editorial discretion over what is carried on their channels, violate basic First Amendment rights recently reaffirmed by a unanimous decision of this Court in *Miami Herald Publishing Co. v. Tornillo.*[1] These rights, as two Courts of Appeals have agreed,[2] are as applicable to cable television as to newspapers.

That the access rules convert cable operators into common carriers is undisputed. Each cable television system serving 3,500 or more subscribers must supply any "available activated channel," on demand, to anyone requesting it for access services, whatever his commercial or other motivation. Cable operators have no control over who will provide programming on these channels or what the quality or content of that programming will be — even though such programming may preempt the cable operators' own programming.

[1] 418 U.S. 241 (1974).

[2] *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1056 (8th Cir. 1978); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

Under the access rules, the right of cable operators to program their channels is subordinated to the programming demands of access users. In its *Report and Order* promulgating the modified access rules, the Commission stated: "While we shall continue to encourage operators to originate, we do not believe that the public interest will be served if such efforts are at the expense of others who wish to provide access programming."[3] Not only would the Commission "scrutinize the actions of operators who, while providing their own programming, assert that their activated capability is insufficient to permit the leasing of a channel to potential competitors,"[4] it promised to "take whatever action is appropriate" to prevent cable operators from excluding leased access users from their facilities.[5] The Commission noted that if a cable operator had only one complete channel available for access services, the operator's decision to use the channel to provide his own "pay" programming would be considered evidence of bad faith.[6] In its *Memorandum Opinion and Order* on reconsideration of the 1976 Order, the Commission reaffirmed that access uses would be superior to the cable operator's origination efforts: "[W]e believe access programming should continue to have priority status over operator-originated programming where they compete for the final available channel on a cable system."[7]

[3]*Report and Order in Docket 20508*, 59 F.C.C.2d 294, 316 (1976), Petitioner's App. at 144. "Origination" programming is not available on over-the-air broadcast television stations, but is provided to the cable subscriber for no extra charge beyond the regular monthly fee for general cable television services. Origination programming may be produced locally or purchased nationally.

[4]*Id.*, Petitioner's App. at 144-45.

[5]*Id.*, Petitioner's App. at 145.

[6]*Id.* at 317, Petitioner's App. at 145. "Pay" programming is provided to subscribers for a monthly charge in addition to the regular charge for general cable television services.

[7]*Memorandum Opinion and Order in Docket 20508, on Reconsideration*, 62 F.C.C.2d 399, 404-05 (1976), Petitioner's App. at 182, 195.

Imposition of common carrier status fundamentally alters the nature of the cable television industry and seriously undermines its prospects for growth. Cable television no longer merely retransmits broadcast signals. To be sure, retransmission remains a primary function, but cable systems now also provide innovative, nonbroadcast programming to their subscribers. Cable operators produce their own programming and exercise editorial discretion in selecting programming from a variety of sources. Some examples of this new programming abundance follow:

> **Entertainment** — A number of program suppliers offer packages of first-run movies,[8] sports, and nightclub performances not available on broadcast television.[9] The major suppliers deliver their programming to cable systems nationwide by satellite.[10]
>
> **News** — UPI, AP, and Reuters currently supply daily news programming to cable systems.[11] A fourth service has proposed to deliver to cable systems by 1980 a 24-hour news channel with a live, "network-style" news format.[12]
>
> **Children's Programming** — One major cable company already delivers by satellite daily, commercial-free, non-violent children's programming for cable television.[13] A second company has an-

[8]Although some of these movies may be shown eventually on broadcast television, a movie shown uncut and without commercial interruption on a cable system is a substantially different artistic product than the same movie edited and shown with commercial interruptions on broadcast television.

[9]*See, e.g., TVC*, Aug. 1978, at 25-27; *Vue*, June 26, 1978, at 25-26; *Vue*, June 12, 1978, at 32-33; *Vue*, Apr. 17, 1978, at 49-55.

[10]*Vue*, Sept. 11, 1978, at 33; *TVC*, Aug. 1978, at 25-27.

[11]*N.Y. Times*, July 6, 1978, at C19, col. 4; *Vue*, Aug. 21, 1978, at 24-29; *Vue*, May 1, 1978, at 76-79.

[12]*TVC*, Nov. 1, 1978, at 11.

[13]*Wall St. J.*, Dec. 5, 1978, at 20, col. 3; *TVC*, Nov. 15, 1978, at 44-51; *Vue*, May 1, 1978, at 86.

nounced plans to provide national delivery of up to 13 hours a day of children's programming. In addition, Walt Disney Productions supplies programming directly to cable companies.[14]

Political Coverage — Many cable systems will soon be offering gavel-to-gavel coverage of proceedings in the U.S. Congress.[15] A "two-way" cable system in Columbus, Ohio, recently carried a local town meeting and a public hearing of the U.S. Food and Drug Administration, with viewers using their home terminals to transmit their immediate responses to the government officials.[16] Many cable systems carry city council meetings and court proceedings live, and have provided local political candidates with "cable time."[17]

Religious Programming — Three major national suppliers of religious programming deliver the Gospel to cable television systems throughout the country.[18]

Cultural Programming — The potential of cable television to provide the viewer with unique cultural programming is being realised. Cable viewers already receive cultural programs, from high-school plays to opera.[19] And producers are expanding their cultural efforts to include, for example, taping off-Broadway productions.[20]

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[14] *Vue*, July 24, 1978, at 37.

[15] *N.Y. Times*, May 2, 1978, at 69, col.2.

[16] *TVC*, Nov. 1, 1978, at 25; *TVC*, Aug. 1978, at 12; *Vue*, July 24, 1978, at 40.

[17] *See, e.g., TVC*, Aug. 1978, at 40; *Vue*, May 1, 1978, at 80.

[18] *TVC*, Aug. 1978, at 27; *TVC*, May 1978, at 39-43.

[19] *See Newsweek*, July 3, 1978, at 64-65; *Vue*, June 26, 1978, at 26.

[20] Paul Kagan Assocs., *Pay TV Newsletter*, No. 133, Nov. 17, 1978, at 4.

Other Services — A new data bank service provides subscribers, over cable television channels, access to hundreds of thousands of pages of the latest securities' and commodities' prices and market reports, as well as fast-breaking news. Subscribers are able to call up, almost immediately, any specific information desired.[21] Cable systems have also developed burglar and fire alarm services and energy control devices for their subscribers.[22]

From the recent explosion of nonbroadcast program offerings on cable television, it is obvious that the horizons of "cablecasting" are not yet visible. Satellite technology has revolutionized the delivery of national programming choices to cable television operators,[23] and the demise of the FCC's restrictive "pay cable" rules in *Home Box Office, Inc. v. FCC*[24] has opened up a major new source of programming for subscribers. At the same time, cable television operators have found that quality local programming attracts viewers.[25] The provision of nonbroadcast programming to subscribers is the future for cable television.

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[21] *Cablevision*, Nov. 6, 1978, at 43.

[22] *See N.Y. Times*, Apr. 19, 1978, at C25, col.1.

[23] The 18 transponders available to cable television on the Satcom I satellite are booked. RCA American Communications, Inc. has proposed to the FCC the launching of a new satellite, Satcom III, with all 24 transponders to be reserved for cable television programming. *See Broadcasting*, Dec. 11, 1978, at 78.

[24] 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). The pay cable rules were but part of an FCC regulatory scheme for cable television that has received extensive criticism. Commentators have found that this regulatory scheme has significantly slowed the development of the cable television industry. *See, e.g.*, Staff of House Subcomm. on Communications, 94th Cong., 2d Sess., Cable Television: Promise Versus Regulatory Performance (Subcomm. Print 1976).

[25] *See, e.g., N.Y. Times*, Apr. 13, 1978, at C22, col.1.

Cable television is thus an emerging element of the electronic press; in no way may it accurately be characterized as merely a "conduit."[26] Increasingly, the large cable television systems are producing their own programming. Even when they purchase programs and program-packages from suppliers, they retain discretion over what they actually carry. And they select and negotiate with program suppliers to assure the proper mix and quality of programming. In no case do they select among competing suppliers merely on the basis of who first walks through the door. Much as television stations switch network affiliations and newspapers switch wire services, cable operators switch program suppliers. As the number and diversity of program suppliers continue to grow, the editorial function exercised in selecting programming will become ever more important.

The provision of attractive nonbroadcast services is critical to the growth of cable television. As the FCC itself has recognized, the provision of these additional services is the necessary condition to cable's expansion into major markets.[27] By undercutting the ability of cable systems to provide these services, the access rules threaten to block cable television's expansion.

The access rules are also basically unfair. The success of a major market cable system, which involves the expenditure of millions of dollars to build and years of effort to attract subscribers, is dependent upon the quality of the nonbroadcast services the system offers. Yet the access rules place this critical function in the hands of third parties, who may be devoid of talent, financial responsibility, and

[26]This is a basic misconception of the ACLU. See Brief for ACLU at 28.

[27]*See Cable Television Report and Order*, 36 F.C.C.2d 143, 149 (1972). Since the elimination of the FCC's pay cable rules, there has been a significant upsurge in cable television franchising activity in the major markets. *See, e.g., TVC*, Oct. 15, 1978, at 44. There is franchising activity today in many of the Nation's largest cities. *Id.*

any long term commitment to the system's success or to the community it serves.[28]

STATEMENT OF INTEREST

Amici include many of the largest cable television operators in the United States. The National Cable Television Association is a nonprofit trade association representing the majority of cable television operators throughout the country. As such, it has represented the cable television industry before the FCC, the Congress, and the courts. The National Cable Television Association and Teleprompter Corporation filed briefs as amici curiae in the Court of Appeals below.

As noted elsewhere in this Brief, amici believe that the access rules seriously threaten the future development of cable television and deprive them of their constitutional rights.[29]

[28]"Midnight Blue," an X-rated program provided to New York City cable subscribers on an access channel, caused a furor until the cable company cancelled the program on the ground that it violated the Commission's rules against obscenity. *See N.Y. Times*, May 14, 1976, at C26, col.1. Whether a cable operator may prevent the delivery of obscene access programming today is unclear. *See* FCC's Petition for a Writ of Certiorari, No. 77-1571, at 15-16 n.15.

[29]Amici do not oppose public participation in programming or public use of cable facilities. Indeed, the cable industry reaffirmed its willingness to provide access to members of the public after the Court of Appeals in this case struck down the Commission's access requirements. *See Broadcasting*, Mar. 6, 1978, at 42. But voluntary provision of access is a far cry from the Commission's mandatory access rules, which give the cable operator no discretion. Newspapers voluntarily make space available for letters to the editor without incurring any obligation to make their pages available to all on a first-come, first-served basis. *Cf. Miami Herald Publishing Co. v. Tornillo, supra.* Similarly, cable operators should be able to make their facilities available to third parties when this serves a real public need, without incurring an obligation to do so in all cases, even when there is no such need.

STATEMENT OF THE CASE

In 1976 the FCC modified rules first adopted in 1972 requiring that certain cable television systems make available channels for the provision of "access" services.[30] The rules as modified provide that "to the extent of its available activated channel capability" each cable system serving 3,500 or more subscribers must "maintain at least one specially designated channel" for "public," "educational," "local government," and "leased" access uses.[31] The rules also require that cable television systems "establish rules requiring first-come, nondiscriminatory access." Under the rules, "[e]ach such system shall have no control over the content of access cablecast programs***."[32]

Although cable television systems may combine public, educational, governmental, and leased access services on one composite channel if demand permits, requests for access channel space must be honored until the "available activated channel capability" is exhausted.[33] Channels are "available" for access use unless they are being used for the retransmission of broadcast signals or the carriage of pay programming. Although a channel may be in use for the provision of origination programming, it is nonetheless

[30] *Report and Order in Docket 20508*, 59 F.C.C.2d 294 (1976), Petitioner's App. at 93.

[31] 47 C.F.R. § 76.254(a). The rules permit access services to be combined on one or more channels "[u]ntil such time as there is demand for each channel full time for its designated use." 47 C.F.R. § 76.254(b).

[32] 47 C.F.R. § 76.256(b), (d)(3).

[33] When an access channel is used "during 80 percent of the week days (Monday-Friday) for 80 percent of the time during any consecutive three-hour period for six consecutive weeks" another access channel must be provided, to the extent of activated capacity, until all available channels are exhausted. *See* 47 C.F.R. § 76.254(d). When an access channel is used according to this formula, the cable operator has six months to provide another channel, if any are "available." *Id.*

"available" for access.[34] Even pay and retransmission channels may be bumped for access use when necessary to provide at least one access channel on a system. And when a channel is used for access, the operator may not reclaim it to provide programming he would prefer to provide to his subscribers,[35] even if no other channel is available. In sum, the access rules subordinate the cable operator's choice of programming to that of access users.[36]

Midwest Video Corporation and the American Civil Liberties Union petitioned for review of the access rules, and the United States Court of Appeals for the Eighth Circuit set aside the rules as beyond the Commission's jurisdiction. The court noted that "[t]he present access rules strip from cable operators * * * all rights of material selection, editorial judgment, and discretion enjoyed by other private communications media, and even by the 'semi-public' broadcast media."[37] The court continued:

> Cable operators must allow use of their facilities, for transmission toward their paying subscribers, of *any* program material, no matter the quality, interest, relevance, taste, context, beauty, or scurrilousness * * *. They must lease a channel to any person, regardless of business reputation, competence, or financial standing.[38]

[34] The Commission did state in footnote to its 1976 *Report and Order* that it did not intend that "established cablecast [origination] services," provided by system operators be "automatically displaced" and that it would "consider each such situation individually on its merits." 59 F.C.C.2d at 316 n.19, Petitioner's App. at 143 n.19. But under the rules it is the burden of the cable operator to obtain a waiver before he may refuse a request for access on the grounds that the only "available" channel is being used for origination services.

[35] *Id.* at 317, Petitioner's App. at 144-5.

[36] See discussion at p. 2, *supra*.

[37] *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1055-56 (8th Cir. 1978), Petitioner's App. at 73.

[38] *Id.* at 1056, Petitioner's App. at 73 (emphasis in original).

The court also ruled that "the First Amendment overtones, and other constitutional considerations" reinforced the conclusion that the Commission lacked jurisdiction to impose the access requirements.[39]

ARGUMENT

I. THE FCC'S ACCESS RULES ARE NOT AUTHORIZED UNDER THE COMMUNICATIONS ACT.

Despite its own pronouncement that common carrier regulation for cable television nonbroadcast channels would be inappropriate,[40] the Commission has imposed common carrier-type obligations on cable television. The access rules impose the two major prerequisites of communications common carriage: (1) provision of service on an indiscriminate basis to all users, and (2) transmission of "intelligence of [the customer's] own design and choosing." *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976). The Government has conceded that "[t]he access rules in effect impose a limited form of common carriage obligations upon cable operators."[41]

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[39] *Id.* at 1053, Petitioner's App. at 65.

[40] *Clarification of Cable Television Rules*, 46 F.C.C.2d 175, 186 (1974).

[41] Brief for United States in Support of FCC's Petition for a Writ of Certiorari at 16. The Government is wrong, however, to characterize the imposition of common carriage obligations as "limited." Although the Commission has not attempted to regulate cable television under Title II of the Communications Act, 47 U.S.C. §§ 201-33, the Commission does require cable systems to prepare and file with it rules governing the terms, conditions, and rates for the use of access channels (the equivalent of a tariff). *See* 47 C.F.R. § 76.256(d). And the rates charged for leased access are apparently subject to FCC review. *See Report and Order in Docket 20508, supra*, 59 F.C.C.2d at 316, Petitioner's App. at 143; *Cable Television Report and Order*, 36 F.C.C.2d 143, 190, 192 (1972).

It is this conversion of cable operators from transmitters and originators of programming to communications common carriers which most distinguishes the instant case from the situations presented to this Court in *United States v. Southwestern Cable Co.*[42] and *United States v. Midwest Video Corp.* ("*Midwest Video I*").[43]

Southwestern Cable and *Midwest Video I* establish that FCC jurisdiction over cable television exists under Section 2(a) of the Communications Act[44] to the extent "reasonably ancillary to the effective performance of [the FCC's] various responsibilities for the regulation of television broadcasting."[45] In each of these cases, jurisdiction is defined by analogy to the Commission's statutorily authorized policies and rules with respect to broadcasting. *Southwestern Cable* affirmed the Commission's authority to regulate cable as necessary to regulate effectively broadcast television. *Midwest Video I* affirmed the Commission's authority to require cable operators to do what broadcasters do — originate programming.

The Commission's access rules break down the regulatory analogy to broadcasting. The rules cannot be justified as necessary to protect broadcasting, *see Southwestern Cable*,

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[42] 392 U.S. 157 (1968).

[43] 406 U.S. 649 (1972). The Government incorrectly asserts that imposition of common carrier responsibilities on a cable system is supported by analogy to the signal carriage rules, which require cable systems to transmit, on request, the signals of local broadcast stations. See Brief for U.S. and FCC at 48. Unlike the random, first-come, first-served basis of the access rules, the signal carriage rules carefully identify what signals must be carried. Moreover, the choice of "must carry" signals under the signal carriage rules is made to protect the broadcast license allocation scheme, which lies at the heart of broadcast regulation. *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 210-18 (1943). As noted at p. 20, *infra*, the access rules are utterly inconsistent with the scheme of broadcast regulation.

[44] 47 U.S.C. § 152(a).

[45] 392 U.S. at 178; 406 U.S. at 663.

or as a complement to broadcasting by defining the duties of cable systems in terms of the normal function of broadcasters, *see Midwest Video I.* Instead, the rules impose obligations on cable operators totally foreign to broadcasting. The common carrier-type regulation contained in the access rules is explicitly withheld from the Commission for use in broadcasting by Section 3(h) of the Communications Act.[46] As noted by the Court of Appeals below, the Commission's access rules "impermissibly intermix[ ] the two fields which Congress expressly kept asunder, by its enactment of § 3(h) of the Act, and its separate treatment of common carriers (Title II) and broadcasters (Title III) in the Act."[47] The FCC has no authority to regulate cable television as a common carrier.[48]

Despite the Government's contention that the access rules were intended to be less burdensome than the mandatory origination rules upheld in *Midwest Video I*,[49] the

[46]Section 3(h) provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h).

[47]*Midwest Video Corp. v. FCC, supra,* 571 F.2d at 1052, Petitioner's App. at 63.

[48]*See Philadelphia Television Broadcasting Co. v. FCC,* 359 F.2d 282, 284 (D.C. Cir. 1966). Notwithstanding the offhand suggestion that access channels, "from a technological point of view, *could* function as common carriers," *American Civil Liberties Union v. FCC,* 523 F.2d 1344, 1350 (9th Cir. 1975) (emphasis added, footnote omitted), the Ninth Circuit's decision cannot be construed as upholding regulation of pay cablecasting as a common carrier activity. The court there held that the Commission's decision not to exercise authority over access channels pursuant to Title II of the Communications Act was itself an action "'reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting.'" *Id.* at 1351 (citation omitted). Since the issue in that case was whether the Commission was obligated to go *beyond* the access rules and adopt affirmative regulations required by Title II, the court's decision must be interpreted as upholding the 1972 rules only to the extent that their validity was not found wanting by reason of the Commission's refusal to incorporate the full range of Title II requirements.

[49]*See* Brief for U.S. and FCC at 7.

access rules are far more radical and have farther reaching effects. By taking away the cable operator's control over nonbroadcast programming, the access rules alter the fundamental nature of cable television in a way that the mandatory origination rules never could have. The Courts of Appeals are in agreement with Mr. Chief Justice Burger that *Midwest Video I* must represent the " 'outer limits' " of the Commission's jurisdiction.[50] The access rules go beyond those limits.

Imposition of common carrier-type obligations on cable television is especially inappropriate in view of the correspondence between cablecasting and broadcasting. As this Court recognized in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*,[51] when cable systems undertake to originate programs wholly independent of programs they receive off-the-air from broadcasters, sell advertising time and commercials, and interconnect with other cable systems for the purpose of redistributing programming originated on cable television, they are closely akin to broadcasters.[52] Ironically, the Commission's rules, which must be justified as being ancillary to its broadcast responsibilities, permit access users to preempt origination functions of cable operators — those very functions which most closely correspond to broadcasting.[53]

[50]*Midwest Video I,* 406 U.S. at 676 (Burger, C.J., concurring); *Midwest Video Corp. v. FCC,* 571 F.2d at 1038 n.29; *Home Box Office, Inc. v. FCC, supra,* 567 F.2d at 28; *see also National Ass'n of Regulatory Util. Comm'rs v. FCC,* 533 F.2d 601, 615 (D.C. Cir. 1976).

[51]415 U.S. 394 (1974).

[52]*Id.* at 402-05.

[53]Nor may the Government take comfort in the primary difference between cable television and broadcasting, that cable television is not subject to the limitations of the broadcast spectrum. *See* Brief for U.S. and FCC at 30 n.26. Indeed, broadcast regulation finds its primary justification in spectrum scarcity. *See Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 376-77 (1969). Without the same limitations, cable television should be the subject of less regulation, not more.

The Government attempts to justify the mandatory access requirements on the ground that they contribute to the broadcast "objectives of increasing community outlets of expression and increasing programming choices."[54] It is not enough, however, that the objectives of the access rules be similar to objectives in the regulation of broadcast television. The means — as well as the ends — must be those permitted in broadcast regulation. Both the Eighth Circuit and the D.C. Circuit have stressed that the FCC's ancillary jurisdiction over cable is limited to the use of "regulatory tools" permissible for broadcast television regulation.[55] The Courts of Appeals' analysis must be correct: it would be a strange gloss indeed on the Communications Act were the Commission's implied, ancillary responsibilities over cable television to exceed its explicit, primary responsibilities over broadcast television.[56] Congress has carefully and explicitly delimited the scope of the Commission's regulation of broadcasters.[57] If the Commission's responsibilities over cable are to be more extensive, that is a decision to be made by Congress.[58]

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[54]Brief for U.S. and FCC at 26.

[55]*See Midwest Video Corp. v. FCC, supra*, 571 F.2d at 1048; *Home Box Office, Inc. v. FCC, supra*, 567 F.2d at 31.

[56]*See, e.g., Home Box Office, Inc. v. FCC, supra*, 567 F.2d at 28; *cf. Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

[57]*See* Title III of the Communications Act, 47 U.S.C. §§ 301-397.

[58]Proposed legislation relating to the FCC's jurisdiction over cable television has recently been introduced in Congress. Communications Act of 1978, H.R. 13015, 95th Cong., 2d Sess., 124 Cong. Rec. H5231 (daily ed. 1978).

II. THE FCC'S ACCESS RULES VIOLATE THE FIRST AMENDMENT RIGHTS OF CABLE TELEVISION OPERATORS.

A. The Access Rules Abridge the First Amendment Right of a Cable Operator to Select Speakers of His Choice on Subjects of His Choice.

The FCC's requirement that cable systems make available channels to access users violates the First Amendment because it requires, as the Government has conceded, that the cable operator "transmit communications on its facilities that it might prefer not to."[59] *Miami Herald Publishing Co. v. Tornillo*[60] is squarely on point. In *Tornillo* a unanimous Court struck down a Florida statute requiring that a newspaper provide "access" for a reply by a political candidate attacked in the newspaper. Writing for the Court, Mr. Chief Justice Burger noted:

> [T]he Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which "'reason' tells them should not be published" is unconstitutional.[61]

Even if the newspaper would incur no additional expense and would not be forced to forego publication of its own opinion or news to include a "reply," the Court determined that the Florida statute violated the First Amendment.

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[59]Brief for U.S. and FCC at 39.

[60]418 U.S. 241 (1974).

[61]418 U.S. at 256, *quoting Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945).

The Court rejected arguments almost identical to the Government's arguments here that the First Amendment should not apply to the access rules because the rules further "competing First Amendment interests"[62] and because cable television has "the characteristics of a natural monopoly."[63] In response to the argument that access would add to diversity of expression, the Court categorically denied that this could justify the reply statute.[64] The Court also recognized that "'[o]ne-newspaper towns have become the rule, with effective competition operating in only 4 percent of our large cities,'"[65] and that "the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible."[66] Yet the Court refused to balance First Amendment rights against the practical benefits of access, stating:

> However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First

[62]Brief for U.S. and FCC at 40.

[63]*Id.* at 45. There is no record support for the Government's statement in its Brief, at 45, that cable television is subject to special physical constraints, like public utilities. Moreover, there are several forms of electronic media, such as broadcast television and subscription television, which have the same capability to deliver programs to a television receiver. In New York City, for example, cable television has competition from 23 broadcast television stations. See Television Digest, 1978 Cable & Station Coverage Atlas, at 67b.

[64]418 U.S. at 251. The Court reaffirmed the point two years later in *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

[65]418 U.S. at 249 n.13 (citation omitted).

[66]*Id.* at 251 (footnote omitted).

> Amendment and the judicial gloss on that Amendment developed over the years.[67]

Nor is the First Amendment mischief caused by the access rules any less severe than that caused by the reply statute in *Tornillo*. The Government argues that the access rules are less offensive because, unlike the reply statute, they are "unrelated to the content of what the cable operator otherwise transmits."[68] Yet the Court made clear in *Tornillo* that it was resting its decision on the ground that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment."[69] It is every bit as much an infringement on freedom of the press to require a publisher to permit coverage of an issue consciously avoided, as it is to require him to permit a response to a position consciously taken.[70]

[67]*Id.* at 254 (footnotes omitted).

[68]Brief for U.S. and FCC at 40.

[69]418 U.S. at 258.

[70]*See Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 130 (1973). In the *CBS* case, this Court held that broadcasters were *not* required under the First Amendment to permit public access to their facilities. And while the Court declined to extend its determination at that time to "some kind of limited right of access," *id.* at 131, it seems clear that the Court did not envision requiring a broadcaster to devote a substantial amount of its programming to public use on a first-come, first-served basis without control by the broadcaster over content. Nor may this Court's passing reference to the cable access rules in *CBS* be considered any statement as to the legitimacy of those rules, either under the First Amendment or the Communications Act. *See id.*

B. The Access Rules Violate the First Amendment Because They Require Cable Operators to Carry Access Programming Instead of Programming They Might Prefer to Carry.

The FCC argues that the "court of appeals failed to recognize the limited nature of the access rules."[71] But the Commission's access rules are by no means a "limited" restriction on the discretion of cable operators. The rules require that any "available" activated channel must be provided to the first person to request it.[71] If a cable television operator has no vacant channel, he must preempt origination programming to meet an access request, unless he can convince the Commission to waive this requirement.[72] And if necessary to provide at least one composite access channel, the cable operator must preempt pay or retransmission programming.[73] The Commission has made it clear that access programming has "priority."[74] Moreover, once a channel is used for access, the operator may not bump the access programming for programming he would prefer to provide his subscribers.[75] The rules, therefore, operate not only to require the cable operator to publish communications he may prefer not to — itself a denial of free speech — but they also deny the operator the

[71] Brief for U.S. and FCC at 37.

[71] *See* 47 C.F.R. § 76.254(a).

[72] *See* 47 C.F.R. § 76.254(d); *Report and Order in Docket 20508, supra*, 59 F.C.C.2d at 315-16 & n.19, Petitioner's App. at 142-43 & n.19.

[73] *See id.* at 316-17, Petitioner's App. at 145.

[74] *Memorandum Opinion and Order in Docket 20508, on Reconsideration, supra*, 62 F.C.C.2d at 404-05, Petitioner's App. at 195.

[75] *See Report and Order in Docket 20508, supra*, 59 F.C.C.2d at 316, Petitioner's App. at 144-45.

right to publish communications he would prefer to publish.[76]

This preemption of the cable operator's ability to speak, present in this case to a far greater degree than in *Tornillo*, makes the access rules a clearer violation of the First Amendment than the reply statute found unconstitutional in *Tornillo*.

C. Cable Television is Entitled to the Same First Amendment Rights as are Other Media.

The Government attempts to reconcile the access rules with the First Amendment by arguing that cable television is not entitled to the same First Amendment rights as are other media. This contention raises issues of fundamental importance, because cable television has the potential to become one of the primary vehicles for the dissemination of information in this Nation.

In support of its position that cable television operators are not entitled to the same First Amendment rights as are newspaper publishers, the Government points to certain similarities between cable television and other electronic

[76] While cable television is not limited by the broadcast spectrum, the number of channels available for programming to subscribers is limited by cost factors. Although coaxial cable used by a cable television system will transmit 30 or more television channels at the same time, television sets are designed to receive only 12 VHF channels, and unless the cable television system employs expensive set converters, the practical number of channels that can be received by a subscriber is 12. Even in the newer systems, which generally provide converters, the explosion of nonbroadcast services means that editorial selections will have to be made among available programming. This Court recognized in *Tornillo* that "as an economic reality" a newspaper cannot proceed "to infinite expansion of its column space to accommodate the replies that a government agency determines." 418 U.S. at 257. Neither can a cable television system continually add channel capacity to accommodate undesirable programming in order also to provide preferred programming.

media. Because cable television has some of the physical characteristics of a public utility and functions in some respects like a broadcast station, the Government argues, cable should be subject to governmental restraints on its press freedoms. This attempt to create different, and inferior, First Amendment rights based on the technology used to publish portends an enormously dangerous erosion of the freedom of the press.

It is true, of course, that cable television delivers information by wire to an electronic receiver, while newspapers and other print media currently record and deliver an impression on paper. But it is not only probable, it is virtually certain, that in the next decade news and other information will be transmitted to the home by electronic means, and the technological differences drawn by the Government between newspapers and cable television will blur beyond reasonable distinction. Already, UPI, AP, and Reuters supply news programming to cable television, and cable systems carry live coverage of government proceedings.[77]

That broadcasters are subject to special First Amendment analysis bears no relevance here. Broadcast television licensees are subject to affirmative duties because the inherent limitations of the broadcast spectrum have required some governmental regulation of who may use the airwaves. Granted an exclusive license to use a specified portion of a scarce public resource, broadcasters must act as public trustees.[78] Cable television is not subject to the limitations of the broadcast spectrum.[79] Nor has the FCC

[77] See pp. 3-4, *supra*. The D.C. Circuit found no "constitutional distinction" between newspapers and cable television in *Home Box Office, Inc. v. FCC*, *supra*, 567 F.2d at 46. The Eighth Circuit reached a similar conclusion in this case below, *Midwest Video Corp. v. FCC*, 571 F.2d at 1056.

[78] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 394 (1969).

[79] The American Civil Liberties Union concedes this point. Brief for ACLU at 37.

awarded cable television any rights to exclusive use of public resources.

Even if the Government were correct that cable television operators' First Amendment rights should be similar to broadcasters', it would not justify the access rules. The access rules go far beyond broadcasting regulation. Moreover, the Government concedes that whether the access rules could be imposed on broadcasters is an "open question."[80] We believe that even this characterization goes too far. Justices Stewart and Douglas both stated that imposition of even the limited right of access sought by the petitioners in the *CBS* case would violate the First Amendment rights of broadcasters.[81] And we cannot imagine that this Court would countenance the sweeping preemption of broadcasters' editorial discretion that the access rules impose on cable television operators.

The First Amendment rights of common carriers bear no more relevance here than do the First Amendment rights of broadcasters. Common carriers enjoy no First Amendment rights for the messages they carry, not because the messages originate with others,[82] but because common carriers by definition have no control over message content.[83] If cable television systems were common carriers, then their First Amendment rights would be limited. But cable television systems, which are extensively engaged in their own cablecasting, are not common carriers — except under the access rules. The Commission may not, of course,

[80] Brief for U.S. and FCC at 29 n.24.

[81] *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, *supra*, 412 U.S. at 144-46 (Stewart, J., concurring), 150-52 (Douglas, J., concurring).

[82] *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 386-87 (1973). Of course, newspapers enjoy First Amendment protection for wire service stories, as broadcasters do for network programming.

[83] See p. 10, *supra*.

require someone to behave as a common carrier, and then use that behavior to limit the putative carrier's First Amendment rights.

We submit that requiring a cable television operator to give up all editorial control over a portion of his bandwidth cannot fairly be distinguished from requiring a newspaper to reserve a portion of its paper to be used by others as they see fit. A channel provided by a cable operator to subscribers can no more easily be disassociated from the other channels he provides than a newspaper can disavow responsibility for what an advertiser wishes to have printed on the back page. Just as a newspaper publisher may wish to decline to print advertisements for X-rated movies, so too may a cable operator prefer not to have the same films transmitted to his subscribers over an access channel.

III. CONCLUSION

Each medium of expression develops its own image. It can deliver "all the news that's fit to print," or it can cater to baser human interests. Emerging from restrictive FCC regulation of nonbroadcast programming sources,[84] the cable industry is rapidly moving toward the development of its programming function. The access rules threaten to assign control of this development to others on a random, first-come, first-served basis. The FCC may not, we submit, under the Communications Act or the First Amendment, deny this authority and responsibility to cable operators.

We do not contend that cable operators will always satisfy some ideal of quality or public benefit. But the cable operator, with a massive investment in plant and good will, has a strong incentive to act responsibly. The cable operator needs the same opportunity to exercise his discretion — and occasionally to be wrong — as the owner of any other mass medium.

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[84] *See Home Box Office, Inc. v. FCC, supra.*

Amici respectfully request this Court to hold that the FCC exceeded its constitutional and statutory authority in adopting its access regulations, and to affirm the Court of Appeals' rejection of those regulations.

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